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No. 00-

IN THE

Supreme Court of the United States

BRAZOS ELECTRIC POWER COOPERATIVE, INC.,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION and TENASKA IV TEXAS PARTNERS, LTD.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In order to promote the efficient use of fuel and to reduce imports, the Public Utilities Regulatory Policies Act ("PURPA") authorizes the Federal Energy Regulatory Commission to exempt "qualifying cogeneration facilities" from State and Federal rate and other utility regulation and to confer other valuable benefits on them. PURPA requires that the co-product of a cogeneration facility be produced for a business purpose independent from electricity production and that the co-product be "useful," that is, not merely support qualifying facility status. The Cleburne Plant produced electricity that it sold to Brazos at non-regulated rates, plus millions of gallons of distilled water that the City of Cleburne nominally purchased for $10 per month and then poured down its sewers as waste. Applying an irrebuttable presumption that production of a common product such as distilled water is economically useful, the FERC held that the Cleburne Plant was a qualifying cogeneration facility without regard to Brazos' evidence. The questions presented are:

1. Where there exists a statutory and regulatory requirement that in order to obtain the benefits that Congress accords to a qualifying cogenerator the product produced by cogeneration must be useful, can an agency satisfy that requirement by conclusively presuming that where a thermal output product (here, distilled water) is "common," it is useful, even in the face of a demonstration that the millions of gallons of the distilled water "sold" for $10 per month are discarded down a sewer?

2. Can an agency avoid the statutory language that requires a determination of usefulness by applying an irrational and arbitrary but conclusive presumption of usefulness "to avoid the necessity for finding that which the legislature requires to be found," *United Scenic Artists Local 829 v. NLRB*, 762 F.2d 1027, 1034 (D.C. Cir. 1985)?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties below are those listed in the caption. Brazos Electric Power Cooperative, Inc. is an electric cooperative which is owned by its member electric distribution cooperatives in Texas, which in turn are owned by those who purchase electricity from the cooperatives.

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BASIS FOR JURISDICTION

A panel of the Fifth Circuit issued its opinion below on February 29, 2000. Petitioner timely filed a petition for rehearing on April 12, 2000, and the panel denied this petition on April 28, 2000 (App., *infra,* 66a).

The jurisdiction of this Court is invoked under 16 U.S.C. § 825*l*(b) (1994) and 28 U.S.C. § 1254(1) (1994).

STATUTES AND REGULATIONS INVOLVED

The following statutes and regulations are set out in the Appendix:

Administrative Procedure Act

Section 10(e), 5 U.S.C. § 706 (1994)

Federal Power Act

Section 3(17)-(18), 16 U.S.C. § 796(17)-(18) (1994)
Section 313, 16 U.S.C. § 825*l* (1994)

Public Utility Regulatory Policies Act of 1978

Section 2, 16 U.S.C. § 2601 (1994)
Section 210(a)-(e), (*l*), 16 U.S.C. § 824a–3(a)-(e), (*l*) (1994)

Title 18, C.F.R., Chapter I — Federal Energy Regulatory Commission

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Section 292.207 (1999)
Section 385.217 (1999)

STATEMENT OF THE CASE

A. Summary

The Federal Energy Regulatory Commission and the United States Court of Appeals for the Fifth Circuit have held that administrative agencies may apply *irrebuttable* presumptions to establish facts that are required by Congress as prerequisites for qualification for cogeneration status and accompanying benefits. The presumption applied in this case is arbitrary and inconsistent with the actual facts.

In the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 ("PURPA"), a conservation measure to save fuel, Congress permitted facilities to avoid state rate and other regulation if they produce electricity and another useful product or service. *See FERC v. Mississippi,* 456 U.S. 742, 750 (1982). Such exemption from regulation can be worth hundreds of millions of dollars to electricity sellers and can cost electricity purchasers a like amount. The FERC ruled, and the Fifth Circuit affirmed, that the FERC may irrebuttably assume that the statutory requirement that a cogenerator must produce a useful co-product is met if the co-product is common. Here, the FERC was upheld in applying an irrebuttable presumption that a cogenerator's production of distilled water was useful, even though the water was given away to the supplier of the pre-distilled water, the City of Cleburne (*i.e.,* "sold" back

to the seller for a $10 per month credit off the seller's much higher water bill), and then disposed of as waste into the City's sewers.

The Fifth Circuit recognized that "presumptions are over-inclusive by definition," but it held that their use was justified to encourage cogeneration. App., *infra*, 24a, 205 F.3d at 246. Thus, the stark question is whether the FERC can use a statute intended to encourage efficient energy use to grant incentives to those who increase the waste of energy by producing millions of gallons of distilled water a month, all of which is dumped into sewers.

B. Factual Statement and PURPA Requirements

In 1993, Brazos Electric Power Cooperative, Inc. entered into a contract with a partnership to purchase electric power and energy for in excess of 23 years from a cogeneration plant to be built in Cleburne, Texas. The contract was conditioned on the plant's being certified under a provision of Texas law governing contracts between utilities such as Brazos and "qualifying facilities under PURPA." In the application to the Public Utility Commission of Texas ("PUCT") for certification, which was granted, the partnership represented that it would operate the plant as a qualifying cogeneration facility under section 3(18) of the Federal Power Act ("FPA"), 16 U.S.C. § 796(18), a provision added to the FPA by section 201 of PURPA, 92 Stat. 3117, 3134-35.

Following the PUCT's grant of contract certification, the contract was assigned by the original partnership to Tenaska IV Texas Partners, Ltd., the entity which would build the Cleburne Plant. Exercising an option available under 18 C.F.R. § 292.207(b), on October 20, 1994, Tenaska applied to the Federal Energy Regulatory Commission for a declaratory order to establish the "QF" status of the proposed Cleburne Plant. Tenaska said that it would be using low pressure steam at the plant "to distill water for sale to a third party." Tenaska's unopposed application was granted by the FERC Staff on

January 13, 1995, *Tenaska IV Texas Partners, Ltd.*, 70 F.E.R.C. ¶ 62,026 (Dir., Div. of Applications 1995), with express reliance on *LaJet Energy Co.*, 44 F.E.R.C. ¶ 61,070 (1988), a case in which the FERC gave what amounted to a *Miranda* warning to the cogeneration industry. In *LaJet*, an applicant had contended that its production of distilled water was presumptively useful because the use of steam to distill water is common, but it had also given the FERC economic projections. Stating that, whether or not distillation of water was common, the economic information in LaJet's application could not be ignored, the FERC denied certification, finding that LaJet did not expect to recover the capital costs of its distillation apparatus through revenues from distilled water sales, and that in the absence of an independent business justification for production of distilled water the water was not useful. *See* 44 F.E.R.C. at 61,194-95. The FERC's *LaJet* rule for certification of plants producing common products, therefore, is that the applicant has the right to remain silent, but anything the applicant says can and will be used against it. In its application for certification, Tenaska had said nothing about the projected economics of its production and sale of distilled water.

The Cleburne Plant began producing electricity in September, 1996. Brazos learned in 1997 that the distilled water being produced at the plant was being delivered to the City of Cleburne and then dumped into the city sewer system. Brazos also learned that, in December, 1994, while Tenaska's application for certification was still pending at the FERC, Tenaska and the City had entered into a contract, terminable by Tenaska on 30 days' notice, under which Tenaska would supply the City with all the distilled water produced at the plant, up to 60 million gallons per year, and would receive in return a payment of ten dollars per month. Distilled Water Supply Agreement, C.A. App. 172-85. Tenaska operated under this agreement during the period at issue, paying the City thousands

of dollars per month for the water that it used to make the distilled water and incurring significant additional costs.[1]

Under the Federal Power Act (incorporating the PURPA cogeneration definition) and the FERC's implementing regulations, to constitute cogeneration a facility must produce electricity and additional energy used for a heating, cooling, commercial or industrial purpose. *See* 16 U.S.C. § 796(18)(A); 18 C.F.R. § 292.202(c). Notwithstanding any pre-operational certification obtained from the FERC, a facility's status as a qualifying cogeneration facility is determined based on the facts at the time that generation of electricity commences, because, as the FERC has explained, a qualifying cogeneration facility must be a cogeneration facility, and there is no cogeneration until operation begins. *See CMS Midland, Inc.*, 50 F.E.R.C. ¶ 61,098 at 61,277-78 (1990), *aff'd mem. sub nom. Michigan Mun. Co-op. Group v. FERC*, 990 F.2d 1377 (D.C. Cir. 1993). Advance certification is preliminary rather than final. The effect of advance certification, via either self-certification or a FERC order, is: (1) to establish a prospective cogenerator's right to demand that an electric utility comply with 18 C.F.R. § 292.303 by interconnecting with and selling power to the cogenerator and contracting to purchase the cogenerator's power; and (2) to establish a prospective cogenerator's exemption from federal and state utility regulation under 18 C.F.R. §§ 292.601-602.

Until this case, the FERC took the position that when it grants such a certification before a plant becomes operational, it merely makes a declaratory judgment based on facts presented by the applicant. If at the time of actual operations the plant is operated inconsistently with the application (*i.e.*, the facts as to plant operation or other matters are untrue), the certification cannot be relied upon.[2]

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1. There is nothing in the record to suggest, and Brazos has no knowledge, that this contract has ever been changed.

2. *See* 18 C.F.R. § 292.207(d)(1)(i). The Commission repeatedly emphasized the provisional nature of initial QF certifications issued

(Cont'd)

The purpose of PURPA's favorable treatment of cogeneration is fuel conservation. The FERC has held that "for a thermal output to be 'useful,' it must have an independent business purpose with some economic justification." *Electrodyne Research Corp.*, 32 F.E.R.C. ¶ 61,102, at 61,278 (1985). Brazos believed: (1) that, because the distilled water produced at the Cleburne Plant had no commercial value and was disposed of as waste, the water clearly was not a *useful* thermal output; (2) that the plant therefore was not operating as a cogeneration facility; and (3) that this constituted, among other things, a breach of Brazos' power purchase contract with Tenaska, under which Brazos was paying and would continue to pay many millions of dollars above both cost and market. Brazos estimated that it could pay as much as $890 million ($450 million at present value) over market for electricity if Tenaska were determined to be a QF. C.A. App. 81-82.

Accordingly, in August 1997, Brazos filed at the FERC a request that it find that the Cleburne Plant was not a qualifying cogeneration facility. C.A. App. 36-322. Brazos alleged that the plant was "*not* operating in conformance with the requirements for QF status as Tenaska had represented that it would in accordance with the Commission's regulations." Brazos said: "This case may well be called the water-down-the-sewer case." *Id.* at 39.

Brazos presented evidence that Tenaska paid the City of Cleburne many thousands of dollars a month for water and, after distillation, returned the water to Cleburne (to be dumped down the Cleburne City sewers) for a ten dollar monthly credit

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(Cont'd)
before plant operations begin and stressed that the qualifying status of certified facilities will be subject to challenge based upon the circumstances of actual operations. *See, e.g., EcoEléctrica, L.P.*, 77 F.E.R.C. ¶ 61,344 at 62,511 (1996); *UNIGAS Corp.*, 67 F.E.R.C. ¶ 61,142 at 61,401 (1994); *Kamine/Besicorp Allegany L.P.*, 63 F.E.R.C. ¶ 61,320, at 63,159 & n.10 (1993).

on Cleburne's substantial water bill.[3] Brazos also alleged that, contrary to PURPA's goal of saving fuel by using it to make electricity and for another useful purpose, it cost energy to make the worthless distilled water. After the distilled water was dumped down the drain and went through the City's waste treatment plant (using more energy), some of the water was resold back to the plant for use in the cooling tower. Brazos characterized operation of the plant as a Rube Goldberg machine, not a project which saves fuel in accordance with the Congressional purpose, and thereby justifies hundreds of millions of dollars in excess electricity rates.

Brazos also filed with the Public Utility Commission of Texas a complaint and application for declaratory order asking that Commission to take jurisdiction over the Brazos-Tenaska contract. The PUCT dismissed without prejudice, holding that because of the FERC's preemptive PURPA authority, it was powerless to act until the FERC determined whether the Cleburne Plant was a qualifying facility. C.A. App. 512-15.

C. FERC's Orders

The FERC rejected Brazos' objections to the Cleburne Plant's QF status, including Brazos' contention that the Cleburne Plant produced no useful co-product. The FERC did so not by considering evidence but by applying an irrebuttable presumption of usefulness. Because it had previously found that distilled water is a "common" product, the FERC said that it "presumes" or "assumes" that producing distilled water is useful in *all* cases:

> The Commission, upon finding that the usefulness of a thermal application has been established by a

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3. Under the Distilled Water Supply Agreement between Cleburne and Tenaska the "distilled water" did not have to be fit for any purpose. C.A. App. 76-77, 179, 185. Indeed, Cleburne abandoned plans to discharge the water into Buffalo Creek to enhance water flows due to its concern about the difficulty or impossibility of getting required Environmental Protection Agency and Texas Natural Resource Conservation Commission permits. C.A. App. 77, 94-95.

> common practice, is making a finding that a particular use of cogenerated thermal energy is economic and it thus "presumes" that the thermal output is useful. Indeed, . . . a more accurate way to describe its process is that it "assumes" that energy is useful within the meaning of the statute when it is used in a common process or used to produce a common product.

App., *infra*, 61a-62a, 83 F.E.R.C. at 61,727, The FERC said its test is

> "designed to determine whether the proposed use of the facility and its thermal output is *bona fide*, or whether it is in essence a sham." *Kamine/Besicorp Allegany L.P.*, 63 FERC ¶ 61,320 at 63,158 (1993). Thus our finding that the use of thermal output to produce distilled water is common assures that the use of the thermal output is *bona fide*.

App., *infra*, 49a, 85 F.E.R.C. at 61,347.

Regarding Brazos' contention that there was not a *bona fide* sale of distilled water, the FERC noted Tenaska's statement that the Distilled Water Supply Agreement ("DWSA") was part of a large, complicated set of arrangements between Tenaska and Cleburne under which, in a footnote, Tenaska implied that it received far more benefits than a mere $10/month. C.A. App., *infra*, 47a-48a, 85 F.E.R.C. at 61,347. Brazos contended that, because the DWSA was terminable at will by Tenaska, the sale of distilled water was severable from other aspects of the Tenaska-Cleburne arrangements and, therefore, only the $10/month credit should be deemed consideration for the sale. However, the FERC felt that it would take a hearing to determine the truth and that such a hearing would open the door to litigation of the usefulness of a common product, thereby discouraging cogeneration contrary to PURPA's purposes. App., *infra*, 47a-48a & n.13, 85 F.E.R.C. at 61,347 & n.13. Thus, the FERC refused to investigate whether in fact Tenaska

was essentially giving away the water produced at the Cleburne Plant and whether it was all being discarded into the sewers, stating:

> Here, Tenaska produces a product, distilled water, which has been found to be presumptively useful. The Commission will not look into the economics of its sale of the product, or into how the product is being used by the unaffiliated purchaser of the product.

App., *infra,* 62a, 83 F.E.R.C. at 61,727.

In its order denying rehearing, the FERC again asserted that "the statute allows our inquiry to end when, as here, a QF's use is shown to be common." App., *infra*, 49a, 85 F.E.R.C. at 61,347 (footnote omitted). It further stated that it "believe[d] that a 'sale' of distilled water was made to a third-party purchaser and that [its] decision not to look at the economics of the sale was correct." App., *infra*, 48a, 85 FERC at 61,347.

D. Decision Below

Brazos petitioned the United States Court of Appeals for the Fifth Circuit for review. The court denied the petition, holding that, despite the fact that "[p]resumptions are over-inclusive by definition," App., *infra,* 24a, 205 F.3d at 246, the FERC's application of an irrebuttable presumption of the usefulness of distilled water is permissible under PURPA. The court reasoned that "allowing post-operation rebuttal of the FERC's presumption of a thermal output's usefulness on [the grounds advanced by Brazos] would impede the development of cogeneration facilities, a development PURPA was enacted to encourage." *Id.*

Judge Emilio Garza concurred, stating:

> Congress wanted to encourage the production of cogeneration facilities because, in developing alternative sources of "useful" energy while

> producing electricity, they improved the energy efficiency of electricity generation facilities in particular and the nation in general. By establishing an irrebuttable presumption that prevents it from ever examining whether a facility's co-produced energy is ever "useful," FERC has opened the door to facilities who meet FERC's technical requirements but defy the language and spirit of PURPA.

App., *infra,* 39a-40a, 205 F.3d at 252-53 (footnote omitted).

However, Judge Garza found that Tenaska had demonstrated "that the thermal energy sold by the Tenaska facility is used to distill water which is sold to the city or directed into Buffalo Creek to attract customers to an adjacent industrial park." App., *infra*, 37a, 205 F.3d at 251.

Brazos sought both rehearing and rehearing *en banc.* Brazos pointed out that Judge Garza was factually incorrect in asserting that the water had been directed into Buffalo Creek. Cleburne's consideration of this possibility was apparently abandoned out of a concern that it could not get necessary environmental permits. *See* footnote 3, *supra.*

Brazos also addressed factual assertions in the majority opinion that Tenaska received benefits from the sale of the distilled water beyond a $10 per month credit to the City's higher water bill and that the City found a purchaser of the distilled water. In its applications for rehearing, Brazos emphasized that the court's factual statements on these matters were not findings of the Commission. The FERC relied solely on its presumption of usefulness and the fact that Cleburne was "independent" from Tenaska, as a corporate matter, to presume that the distilled water is useful and that, therefore, Tenaska was entitled to QF status. The FERC refused to look at Brazos' proffered evidence and ignored that in summary disposition, Brazos' facts had to be assumed to be true.[4]

4. The court states that Cleburne found a purchaser for the water after Brazos filed its Revocation Motion. *See* App., *infra*, 21a, 205 F.3d

(Cont'd)

In both its Rehearing and Rehearing *en Banc* petitions Brazos stressed:

> By applying the irrebuttable presumption of usefulness and economic marketability after electricity was actually produced as well as at the time of initial certification, even to a product that demonstrably had no use, FERC assumed that all cogeneration should be encouraged. But the opinions of the panel and of FERC recognize that Congress intended to provide PURPA benefits only to cogenerators who produce an economically useful product. . . .

Both petitions were denied without comment. Brazos seeks *certiorari.*

(Cont'd)
at 245. The FERC noted Tenaska's claim on this point in its initial order, App., *infra*, 57a, 83 F.E.R.C. at 61,726, but did not rely on it either in its orders below or in its brief to the Fifth Circuit. Any such purchase, even if it otherwise would have qualified the plant, was irrelevant to Tenaska's QF status during the relevant time period.

The FERC's refusal to consider the economics of the distilled water sale meant that it never made a determination whether other consideration allegedly received by Tenaska could be attributed to the sale of distilled water. App., *infra*, 47a-48a, 85 F.E.R.C. at 61,347. Brazos' position that $10/month is the only consideration attributable to the distilled water sale is supported by the Distilled Water Supply Agreement itself, which provides that Tenaska may terminate the contract at its discretion on 30 days' notice and which includes an integration clause. C.A. App. 175, 183. There is no record evidence, nor even any allegation, that Tenaska's termination of the DWSA would affect other aspects of the arrangements between Tenaska and Cleburne, and, therefore, no basis to connect consideration associated with those arrangements to the distilled water sale.

REASONS FOR GRANTING THE WRIT

PURPA grants freedom from federal and state utility regulation and other benefits that total tens of billions of dollars to qualifying electricity producers who save fuel by producing both electricity and a separate useful product.[5] The Fifth Circuit has ruled that the FERC can determine whether the separate product is useful, and therefore whether the producer is entitled to statutory benefits, by applying a presumption that it is useful if it is "common." The application of this presumption, which cannot be factually challenged, means that at least some products

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5. According to data collected by the U.S. Department of Energy's Energy Information Administration, in 1998 there were 1,313 electricity producers that had met the standards established under PURPA to qualify for the privileges granted by the Act. *See Electric Power Annual 1998*, Vol. II (Washington, D.C., December, 1999), p. 91. This number includes both qualifying cogeneration facilities (16 U.S.C. § 3(18)(B)) and a lesser number of qualifying small power facilities (16 U.S.C. § 3(17)(C)). These qualifying facilities generated a full 9% of the total U.S. electricity supply in 1998 (328 billion of 3,617.9 billion kilowatt-hours). *See* "Gross Generation at U.S. Nonutility Generating Facilities by Qualifying Facility Status and Census Division, 1994 Through 1998," available at *http://www.eia.doe.gov/cneaf/electricity/epav2/epav2t59.txt*, and Table A8 of the EIA's *1987-2001 U.S. Electricity Supply & Demand (Annual)*, available at *http://www.eia.doe.gov/emeu/steo/pub/a8tab.html*.

The cost to consumers of compulsory electricity purchases from PURPA qualifying facilities is enormous. The Utility Data Institute estimates that PURPA has caused electricity consumers to suffer $8 billion a year in excess power costs. Resource Data International places the net present value of above-market non-utility generator obligations, 80% of which are PURPA obligations, at $42 billion. *See Hearing on Electricity Competition Before the Subcomm. on Energy & Power of the House Comm. on Commerce*, 106th Cong. (May 20, 1999) (statement of Arthur W. Adelberg, Exec. Vice-Pres., Central Maine Power Co.). *See also* "PURPA Is Responsible for $42 Billion in Utility Above-Market Costs," available at *http://www.purpareform.org/facts8.htm*; *Statement of the Honorable Connie Mack Before the Committee on Energy and Natural Resources, United States Senate*, (April 11, 2000), available at *http://www.purpareform.org/mack.htm*.

that have no economic or other value — and whose production wastes fuel — will be assumed to be useful. Review is warranted because the Fifth Circuit's holding permits FERC to grant benefits under a major federal statute to those who do not meet Congressional standards.

Review is further warranted because there is a direct conflict between two circuits. The D.C. Circuit held in *Southern California Edison Co. v. FERC*, 195 F.3d 17 (D.C. Cir. 1999) that PURPA's statutory classifications of those who are entitled to benefits cannot be expanded to include those who fall outside statutory definitions. Because there are many so-called PURPA plants that in combination sell electricity at billions of dollars above otherwise allowed cost or market rates, review is essential. *See* footnote 5, *supra*. This is especially so because the FERC preempts state regulatory and other authority in determining qualifications for PURPA benefits. *See Independent Energy Producers Ass'n, Inc. v. California PUC*, 36 F.3d 848, 853-54 (9th Cir. 1994). Where FERC wrongfully determines that plants are entitled to PURPA QF status, state authority is ousted without justification.

The decision below raises other substantial federal questions. Allowing the FERC to determine whether co-products are useful through the application of an *irrebuttable* presumption permits it to adopt what is effectively a rule that contravenes statutory commands, contrary to the most basic APA requirement that agency decisions be "in accordance with law." 5 U.S.C. § 706(2)(A). Further, it reinterprets the APA, the Federal Power Act, section 313, 16 U.S.C. § 825*l*, basic administrative law and the Fifth Amendment due process clause to permit cases to be decided in a way that can cost parties hundreds of millions of dollars without allowing them to challenge the presumptions that control decisions in their cases. There can be no "substantial evidence" based on the whole record or protection against "arbitrary and capricious" agency actions when parties are precluded from submitting evidence

as to the facts made relevant by statute. *See Ohio Bell Telephone Co. v. PUC of Ohio*, 301 U.S. 292 (1937); *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962); and *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983).

A. *Certiorari is warranted to review the holding that agencies may decide cases based upon an irrebuttable presumption where application of the presumption would permit results contrary to statute*: In this case, despite overwhelming evidence that the statutory standard of usefulness has not been met, the result is to grant statutory benefits.

The court of appeals recognizes that the irrebuttable presumption is "over-inclusive." App., *infra*, 24a, 205 F.3d at 246. Thus, it recognizes that, in applying the presumption, the FERC will find that some plants are QFs that do not meet statutory standards. This result will cost purchasers of electricity from such plants millions of dollars, even though Congress legislated benefits under PURPA *only* for plants that save fuel, not plants that waste fuel. The decisions deeply offend the Administrative Procedure Act, at least fifty years of administrative law and basic tenets of due process and agency responsibility to adhere to statutory commands.

The FERC's use of an irrebuttable presumption precludes it not only from knowing but *even from looking at* whether PURPA is being complied with. Despite the absurdity, it has been affirmed in its refusal to look.

The holding that through application of an irrebuttable presumption, an agency need not determine whether in an individual case a statutory requirement is met contradicts (or refuses to follow) the most basic APA standard — that agency decisions must be "in accordance with law." 5 U.S.C. § 706. While under *Chevron* agencies have substantial authority to engage in interstitial law-making, they have *no* authority to

contradict statutory language and purpose. *See Chevron U.S.A. v. NRDC*, 467 U.S. 837, 842-44 (1984).

Here, at a possible cost that could come close to one billion dollars over the life of the Brazos-Tenaska contract, the FERC applies an irrebuttable presumption to grant statutory benefits to a cogenerator that does not meet statutory requirements. Moreover, even if such an outcome were somehow appropriate, the FERC has not explained how granting benefits to those who do not meet statutory standards — in this case saving fuel by producing an economic product in addition to producing electricity — will promote the Congressional purpose of promoting energy efficiency. *See FERC v. Mississippi*, 456 U.S. 742, 745-46 (1982).

The only given justification for the irrebuttable presumption was the suggestion that the possibility of hearings on whether statutory standards are met would discourage cogeneration. The Fifth Circuit says that the FERC's irrebuttable presumption of usefulness is justified to "enable cogeneration facilities to obtain financing" by providing investor certainty. App., *infra*, 24a-26a at 25a, 205 F.3d at 246-47, 246. However, Congress legislated benefits only for cogeneration that meets certain fuel-saving tests, not for all plants that produce electricity plus other products.

Further, there is no showing that cogenerators that invest in equipment to make legitimate products would be threatened by a process that requires compliance with statutory standards. The FERC had recognized previously that electricity producers have an incentive to construct cogeneration facilities where the coproduct has no real value other than to qualify the producers for increased electricity rates. Thus, in *Arroyo Energy, Ltd.*, 63 F.E.R.C. ¶ 61,198, at 62,545 (1993) the FERC stated:

> Over time, the Commission has reviewed the design of numerous cogeneration facilities seeking QF status. Many have been designed in a manner revealing that the intended use of thermal energy

> does not serve some legitimate industrial, commercial, heating, or cooling purpose and, in reality, serves merely to help the applicant gain qualifying status under PURPA.

Before this case, the rule was that the FERC would review the legitimacy of a facility at the time of commercial operation, *see e.g., EcoEléctrica, L.P.*, 77 F.E.R.C. ¶ 61,344 (1996) and cases cited therein at 62,511, and FERC does not show why it decided to abandon it. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42.

The court of appeals' reasoning suffers from three major defects. First, it supplies a rationale not used by the FERC. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 50; *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962). Second, it fails to recognize the distinction between encouraging cogeneration plants that produce a useful co-product and generating plants that waste energy. Third, it fails to recognize that legitimate QFs would have no difficulty in obtaining financing under a proper test. If the evidence shows that the cogenerated product could not reasonably be expected to produce revenues sufficient to cover its production costs (or produced in sufficient quantities to meet the FERC's 5% efficiency requirements) *see* 18 C.F.R. § 292.205, the FERC must be prepared not to grant or to revoke certification in appropriate circumstances.

If the FERC's decision is applied generally, as the FERC intends, this will free QFs selling worthless distilled water or any other "common" product from statutory compliance. The resulting rule of law would be that agencies may establish irrefutable presumptions without any basis in reality, even where their application leads to ludicrous results, as here.

B. *Certiorari is warranted to review whether under a "substantial evidence" standard an agency may determine contested facts by applying irrebuttable presumptions*: The APA and the review provisions of the Federal Power Act provide that facts found in contested cases must be supported by "substantial evidence." *See* 5 U.S.C. § 706(2)(E), and 16 U.S.C. § 825*l*. Agencies and reviewing courts must consider the entire record, including evidence that detracts from as well as supports a proposed result. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-91 (1951). Even under informal rulemakings "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' " *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 52, *quoting Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962). Here, the reviewing court permits the FERC, contrary to its regulations,[6] to grant summary disposition against Brazos without a hearing by applying presumptions to predetermine contested, material facts. *See* 18 C.F.R. § 385.217. Thus, the Fifth Circuit permits the FERC to bypass the need for a hearing or the need to examine the evidence.

The application of an irrational irrebuttable presumption plainly subverts the Rule of Law. Conceptually, the FERC's actions here in denying a hearing are similar to declaring that one who has committed a crime before is likely to commit one again and therefore denying a criminal trial. Under the Fifth Circuit holding, neither Brazos nor any other party may ever show facts to demonstrate that the presumption is inapplicable in a particular case.

Brazos presented clear evidence that the distilled water co-product was effectively given away and flushed down a sewer

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6. It is well-established that agencies are generally bound by their regulations. *See, e.g., Accardi v. Shaughnessy*, 347 U.S. 260 (1954); *Service v. Dulles*, 354 U.S. 363, 388 (1957); *Nixon v. United States*, 418 U.S. 683, 695-96 (1974).

and that, therefore, Tenaska is not entitled to cogeneration benefits.[7] Regardless, the FERC determined that because distilled water was common, it must be deemed useful here. Brazos was thus denied the most basic right to be heard and to have its case decided based on facts. The court of appeals upheld the FERC's reasoning that "if a thermal application is a common one, the technology involved must be [presumed to be] established and there must be [presumed to be] a market for the application's end-product." (bracketed material added) App., *infra*, at 4a-5a; 205 F.3d at 238.

The FERC's reasoning would be rational if and only if: (a) all distilled water were of the same quality; and (b) there were a national market for such distilled water. But all distilled water is not the same — distilled water can be highly purified or, as here, it can be of such a quality that it was doubtful whether EPA and Texas environmental authorities would grant permits even for the City to pour it into a stagnant stream. App., *infra*, at 8a, 205 F.3d at 239. *See* footnote 3, *supra*. Even if there were only one grade of distilled water, high transportation cost and low value would make any market for it dependent on its place of production. There is no value to distilled water unless it is produced near those who need it.

The FERC has never considered these questions. Rather, after seeing a fifth application for initial certification of a QF "proposing to distill water with the assistance of the thermal output of a cogeneration facility," the FERC found the production of distilled water to be common and applied an absolute and irrefutable presumption of usefulness. *Id.* at App., *infra*, at 16a, 205 F.3d at 242, *Kamine/Besicorp Allegany, L.P.*,

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7. Chairman Frank Murkowski of the Senate Committee on Energy and Natural Resources referred to the Brazos case as a "poster child example" of PURPA abuse that "forces electricity consumers — residential, commercial and industrial — to pay higher electric rates, of billions of dollars per year, in order to subsidize independent power producers." Nomination of William L. Massey to be a Member of the FERC, 105th Cong., 2d Sess. 7 (1998).

63 F.E.R.C. ¶ 61,320, at 63,158 (1993). However, there is no indication that there is a market for Tenaska to sell enough water commercially to meet FERC or statutory requirements. *See* 18 C.F.R. § 292.205 (C.A. App. 54-55). And without looking at evidence, FERC will never know — and the Fifth Circuit says it doesn't have to — whether distilled water produced through cogeneration by Tenaska or any cogenerator is useful. This means that entities such as Brazos can be subjected to paying hundreds of millions of dollars in excess electricity costs without ever having the right to contest the factual justification for such payments under Congressionally-established standards.

The grant of the writ is necessary to consider the permissibility under the APA and the Federal Power Act of dispensing with the "substantial evidence" requirement through use of irrebuttable presumptions. Moreover, to the extent that an irrebuttable presumption can be used here, the Fifth Circuit's holding would remove agency decisions from the requirements that they be supported by evidence and logic.

Even apart from the APA, constitutional due process requires that cases be decided based on "evidential facts . . . spread upon [a] record." *Ohio Bell Telephone Co. v. PUC of Ohio*, 301 U.S. 292, 300 (1937). Certainly, the APA and Federal Power Act must be interpreted consistently with the Fifth Amendment.

In *Ohio Bell* an agency noticed facts. This Court recognized a party's basic right to dispute matters "by evidence if he believes it disputable." *Id.* at 301-02. In the words of Justice Cardozo:

> Indeed, much that they [regulatory commissions] do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely, that the "inexorable safeguard" (*St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 73) of a fair and open hearing be maintained in its integrity. *Morgan v.*

> *United States*, 298 U.S. 468, 480, 481; *Interstate Commerce Commission v. Louisville & N.Ry. Co., supra*. The right to such a hearing is one of "the rudiments of fair play" (*Chicago, & St. P. Ry. Co. v. Polt*, 232 U.S. 165, 168) assured to every litigant by the Fourteenth Amendment as a minimal requirement. *West Ohio Gas Co. v. Public Utilities Commission* (No. 1), (No. 2), [294 U.S. 63, 79 (1935)] *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 682. Cf. *Norwegian Nitrogen Co. v. United States*, [288 U.S. 294 (1933)]. There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored.

301 U.S. at 304-05.

Official notice of facts requires affording an opportunity for rebuttal in individual cases. *See, e.g., Castillo-Villagra v. INS*, 972 F.2d 1017 (9th Cir. 1992); *Kaczmarczyk v. INS*, 933 F.2d 588 (7th Cir. 1990). In *Castillo-Villagra*, after the Nicaraguan Sandinista Government fell, the INS took notice of this fact. In a large number of cases using identical language, accepting the facts noticed as irrefutably true, it found asylum applicants no longer could have "a well-founded fear of persecution" and, therefore, ordered them deported. 972 F.2d at 1023.

The court said, "Notice is a way to establish the existence of facts without evidence." *Id.* at 1026. It held that applicants had a right to show that the Sandinistas maintained the power to retaliate, regardless of the change of government, and, further, that the petitioners might have a well-founded fear of persecution.

> The problem arises . . . when the petitioner is denied a fair opportunity to rebut the proposition of which notice is taken. An essential concomitant of a rule

> of convenience is a fair opportunity to respond. . . . To deny an opportunity to be heard in these circumstances was a denial of Due Process required by the Fifth Amendment.

Id. at 1028-1029.

The use of irrebuttable presumptions similarly denies the right to be heard. An agency establishes a general proposition and declares that is it determinative in all cases. For the same reason that the *Castillo-Villagra* petitioners had a right to attempt to prove *in their situation* that the change in the Nicaraguan Government did not remove the potential for persecution, Brazos had a right to attempt to prove *in its situation* that the distilled water was not useful.

Here, contrary to long-established decisions of this Court, the APA, and indeed the Fifth Amendment, the FERC bypasses the need for a hearing or examination of evidence by the expedient of deciding cases by irrebuttable presumption, thereby permitting no opportunity for a party to present evidence to the contrary. It permits an interpretation of the APA that is contrary to Constitutional requisites. The Fifth Circuit affirmed. This makes a mockery of the Rule of Law. It permits an agency "to avoid the necessity for finding that which the legislature requires to be found." *United Scenic Artists, Local 829 v. NLRB*, 762 F.2d 1027, 1034 (D.C. Cir. 1985).

C. *Certiorari is warranted to review the Fifth Circuit's holding that the FERC may adopt a rule that any facility that produces a common product has usefulness and, therefore, is a QF under PURPA*: In adopting an irrebuttable presumption of usefulness, the FERC creates a rule of law that cogenerated products that are common and useful in some cases are useful in *all* cases.

PURPA grants exemptions from state regulation to electric suppliers who meet its provisions. In this case the FERC interprets the statute to grant PURPA benefits to cogenerators who may not comply with PURPA's requirements that QFs

produce electricity and useful energy for other "industrial, commercial, heating or cooling purposes." Federal Power Act, § (3)(18)(A), 16 U.S.C. § 796(18)(A) (1994), *implemented in* 18 C.F.R. § 292.202(c) (1999). The FERC's interpretation of the statute will continue QF status for an untold number of plants that do not qualify under the statute with resultant enormous excess rate payments and electricity marketplace distortions. This may have an enormous consequence to consumers of electricity nationally as well as to the competitiveness of purchasers who must pay the higher rates.

It must be recognized that distilled water can be produced by virtually any electric generating plant. It requires a container filled with water under heat. The cost is low compared to the hundreds of millions of dollars of PURPA benefits that Congress legislated for legitimate QFs. There is no reason to presume that a QF making distilled water is doing so for any economic reason other than to get the special PURPA benefits. The use of an irrebuttable presumption certainly cannot be justified when it is used to confer benefits upon entities that Congress did not intend. If an agency were charged with providing a $20,000 stipend to promote pesticide-free agriculture, that agency could not irrebuttably presume that because a number of tomato farmers grow pesticide-free crops all tomato farmers do. In adopting a conclusive presumption that eliminates the Congressional requirement of usefulness, the FERC treats Congress' intent as encouragement of cogeneration facilities, regardless whether a particular facility uses energy to produce a useful by-product.

The FERC's interpretation of the statute is destructive of state authority over electricity. The FERC has asserted exclusive authority to determine whether generators meet the QF standard. *See Independent Energy Producers Ass'n, Inc. v. California PUC,* 36 F.3d 848 (9th Cir. 1994). In this case the PUCT accepted FERC's position. Therefore, Brazos was blocked from obtaining relief under Texas law. Having ousted the states'

authority from the regulatory arena, the FERC had an additional obligation to consider whether PURPA applicants in fact meet statutory requirements.

Thus, grant of the petition is required to consider the permissibility of the FERC's adopting rules that bypass state authority, while the FERC administers the statute without ensuring that Congressional requirements are met. State authority should not be eliminated cavalierly.

Further, Court review is necessary because the FERC has adopted irrefutable presumptions (effectively, regulations, although required APA procedures were not followed) to justify actions that contradict statutory requirements without a factual or reasoned basis for their necessity. These issues are especially appropriate for Supreme Court review where the FERC is preempting state law based on its statutory authority and, presumably, upon its reasoned attention to the matter.

D. *Certiorari is warranted to resolve a conflict between the Circuits in the basic interpretation of a major federal statute*: Directly contrary to the Fifth Circuit's holding in this case, the D.C. Circuit held in *Southern California Edison Co. v. FERC*, 195 F.3d 17 (D.C. Cir. 1999), that where Congress has defined the requirements for facilities to qualify for PURPA benefits, the FERC has no authority to extend PURPA QF benefits in contravention of a statutory limitation, even to encourage development of small power production facilities. *See id.* at 25. In *Southern California Edison*, the FERC sought to ignore a statutory limitation in the definition of a small power production facility in section 3(17) of the Federal Power Act. Section 3(17) is a parallel provision to section 3(18); in each section Congress defined a class of potentially favored electric generators, and then authorized the FERC to establish rules under which members of these classes could become QFs. In this case, as in *Southern California Edison*, the issue was whether the FERC could ignore a restriction in the class definition for the purpose of encouraging QFs.

Here, the FERC seeks to ignore a statutory limitation in section 3(18)'s definition of a cogeneration facility. The limitation is the requirement that a cogeneration plant produce "steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating, or cooling purposes." The FERC's shorthand description of this requirement is the "usefulness" test, and it is met only when the co-product, or thermal output, has "an independent business purpose with some economic justification." *Electrodyne Research Corp.*, 32 F.E.R.C. ¶ 61,102, at 61,278 (1985).

In this case, Brazos has credibly alleged that Tenaska has not produced distilled water for any independent business purpose with economic justification, *i.e.*, because Tenaska's delivery of water to Cleburne is not pursuant to a commercial sale. It is certainly reasonable to posit, as Brazos has, that producing millions of gallons of distilled water when one is contractually bound to provide all of the water produced to a "buyer" who will pay the same $10 whether it receives one million gallons, one gallon, or no gallons,[8] is not something that is done for a commercial purpose. The FERC says that, because distilled water is a common product and granting buyers a right to a hearing to contest the usefulness of common products would discourage cogeneration, PURPA allows it to dismiss Brazos' complaint without considering Brazos' evidence. In other words, the FERC is asserting that to encourage cogeneration, it may in some circumstances read the "usefulness" requirement out of 16 U.S.C. § 796(18)(A), just as it tried to read the word "solely" out of 16 U.S.C. § 796(17)(A)(i) in the order reversed in *Southern California Edison*.

It is important to recognize that the FERC is *not* relying on a notion that the use of steam or heat to produce a common product is *per se* useful under § 796(18)(A). The FERC recognizes that a common product *could be* produced for no legitimate business purpose and that a plant operated in this

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8. If Tenaska fails to deliver *any* distilled water for 36 consecutive months, Cleburne may terminate the contract. C.A. App. 175.

way is not a cogeneration plant under the statute. Indeed, in a case where an applicant for QF certification had submitted economic projections showing that sales of distilled water would *not* recover the costs of distillation, the FERC found that it was *obligated* to review the economic evidence, thereby overcoming any presumption of usefulness that would otherwise attach and mooting the question whether a presumption of usefulness would have been appropriate in the absence of the economic information. *See LaJet Energy Co.*, 44 F.E.R.C. ¶ 61,070, at 61,194-95 (1988). Because LaJet was not proposing to distill water for a commercial purpose, the distilled water was held not to be a *useful* thermal output. *Id.*

Thus, the Fifth Circuit has held that in order to encourage cogeneration the FERC may apply an over-inclusive "presumption" that results in conferring QF status on entities that do not meet the statutory definition of cogeneration facilities. On that basis it declined to consider Brazos' evidence. The distilled water produced by Tenaska is not useful. This creates a conflict with the D.C. Circuit's holding that the FERC may *not* confer QF status on an entity that does not meet the statutory definition of a small power producer. The conflict is significant because of the immense economic value of PURPA QF status, and because inappropriate determinations of QF status wrongly defease states of regulatory jurisdiction over utilities.

* * * * *

In sum, there are important reasons for granting the writ. The Fifth Circuit decision permits agencies to decide cases based on arbitrary presumptions without the opportunity for rebuttal and without consideration of the facts. The result is the grant of very substantial benefits to those who do not meet the prerequisites established by Congress. It is obvious that PURPA was never intended to confer hundreds of millions of dollars in return for the production of hundreds

of millions of gallons of distilled water that are given away and poured into sewers. To accomplish this absurd result the FERC has trampled upon the most basic rights granted by American law. The Fifth Circuit has blessed this outrage. This case cries out for summary reversal.

CONCLUSION

For the foregoing reasons, the writ should be granted and the decision of the Fifth Circuit summarily reversed. Alternatively, the case should be set for briefing and argument.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED FEBRUARY 29, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-60568

BRAZOS ELECTRIC POWER COOPERATIVE INCORPORATED

Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION;

Respondent

Petition for Review of Order of the
Federal Energy Regulatory Commission

February 29, 2000

Before KING, Chief Judge, and REYNALDO G. GARZA and EMILIO M. GARZA, Circuit Judges.

KING, Chief Judge:

Petitioner Brazos Electric Power Cooperative, Inc. ("Brazos") seeks review of an order of the Federal Energy Regulatory Commission ("FERC," or "the Commission")

denying Brazos' motion and petition to revoke the certification of Tenaska IV Texas Partners, Ltd. ("Tenaska") as a "qualifying cogeneration facility" under the Public Utilities Regulatory Policies Act of 1978. We deny the petition for review.

I.

Tenaska is a privately-held partnership engaged in the production of wholesale electric power. Tenaska developed and owns a cogeneration plant in Cleburne, Texas. A cogeneration plant is a facility which produces electric energy and either steam or some other form of useful energy which is used for commercial, industrial, heating, or cooling purposes. *See* 16 U.S.C. § 796(18)(A). Brazos is an electric utility cooperative engaged in the generation and transmission of electric power. The utility is comprised of individual electric cooperatives in Texas and provides power to those cooperatives. Currently, Brazos is purchasing electricity from Tenaska pursuant to the facilities' Power Purchase Agreement. The Power Purchase Agreement was certified under a Texas statute that granted certification of such contracts only if the cogeneration facility met the requirements of the Public Utilities Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. § 823a et seq. Brazos seeks to undo the contract, arguing that Tenaska no longer meets PURPA's requirements.

A further understanding of the facts of this case requires some explanation of the statutes and regulations that control the relationship between a private producer such as Tenaska and public utility corporation such as Brazos. PURPA was

enacted in response to the nation's fuel shortage, and its primary aim was to promote conservation of oil and natural gas in electricity generation. *See FERC v. Mississippi*, 456 U.S. 742, 745-46 (1982). To those ends, PURPA required FERC to promulgate rules encouraging the development of alternative generators of electricity, such as cogeneration facilities. *See* 16 U.S.C. § 824a-3(a). The rationale behind encouraging cogeneration is that the production of electricity frequently results in the production of thermal energy as a byproduct; by using small amounts of additional fuel, cogenerators can produce large amounts of thermal energy to be used in other processes. Congress created regulatory benefits to provide economic encouragement to such nontraditional power producers. For example, qualifying cogenerators are exempt from wholesale rate regulation under all federal and state public utility statutes, *see* 18 C.F.R. §§ 292.601, 292.602, and utilities can be compelled to interconnect with them, paying rates no greater than the utility's full avoided costs, *see* 18 C.F.R. §§ 292.303, 292.308, 292.101(b). In this way, PURPA ensures the cogenerator a market for its electricity production and allows it to make a profit when it can produce power at an average cost lower than the utility's avoided cost.

Of relevance to the instant appeal are PURPA's guidelines for the certification of facilities as "qualifying cogeneration facilities," and FERC's rules prescribing the standards for that certification. The statute defines "cogeneration facility" as one that produces "(i) electric energy, and (ii) steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating, or cooling purposes." 16 U.S.C. §796(18)(A). To determine which nontraditional

power producers could receive benefits, PURPA created a category of "qualifying cogeneration facilities," or QFs, which includes any facility FERC determines has met the regulatory requirements. *See* 16 U.S.C. § 796(18)(B)(i).

FERC's regulations prescribe operating, efficiency, and ownership standards for facilities seeking QF status. *See* 18 C.F.R. § 292.205 (operating and efficiency standards); 18 C.F.R. § 292.206 (ownership criteria). Relevant here is the requirement that electric utilities hold less than 50% of the equity interest in the cogeneration facility. *See* 18 C.F.R. § 292.206. In addition, the cogeneration facility must "produce electric energy and forms of *useful thermal energy* (such as heat or steam), used for industrial, commercial, heating, or cooling purposes, through the sequential use of energy." 18 C.F.R. § 292.202(c) (emphasis added).

FERC has explained that "the ultimate determination of usefulness will be made in the marketplace." *See Electrodyne Research Corp.*, 32 FERC ¶ 61,102, ¶ 61,278 (1985). It therefore applies one of three economic tests in determining whether a thermal output is useful for purposes of QF certification. First, if a cogenerator proposes to use its thermal energy in a common industrial or commercial process, that energy is considered presumptively useful. *See id.* at ¶ 61,279. A process, or thermal application, will be deemed "common" after the Commission has received a satisfactory number of QF applications proposing the same use for the thermal output. *See Kamine/Besicorp Allegany, L.P.*, 63 FERC ¶ 61,320, ¶ 63,158 (1993). The Commission reasons that, if a thermal application is a common one, the technology involved must be established and there must be a market for

the application's end-product. *See Arroyo Energy, L.P. (Arroyo II)*, 63 FERC ¶ 61,198, ¶ 62,545 (1993); *Polk Power Partners, L.P., et al.*, 61 FERC ¶ 61,300, ¶ 62,128 (1992). As such, when a facility's proposed use of thermal energy is common in the industry, FERC presumes the energy used in that application is useful and performs no further analysis regarding the economics of the thermal application. *See Bayside Cogeneration, L.P. (Bayside II)*, 67 FERC. ¶ 61,290, ¶ 62,006 (1994).

When the facility proposes an uncommon application, i.e., one that involves a new technology or creates an end-product without an established market, FERC's analysis is different. *See Electrodyne*, 32 FERC at ¶ 61,278. It employs separate analyses depending on whether the purchaser of the thermal energy — the "thermal host" — is an entity unaffiliated or affiliated with the cogenerator. If an independent entity, unaffiliated with the cogenerator, purchases the thermal energy, FERC considers the energy useful because it assumes no entity would purchase the thermal output, or the end-product produced with the aid of the thermal output, unless it served some legitimate purpose. *See Liquid Carbonic Industries Corp. v. FERC*, 29 F.3d 697, 700 (D.C. Cir. 1994). In other words, purchase by the thermal host establishes that there is an arm's-length market for the output. *See Kamine*, 63 FERC at ¶ 63,158; *Electrodyne*, 32 FERC at ¶ 61,279. FERC, therefore, deems the thermal energy useful and performs no further analysis regarding the economics of the thermal application. *See LaJet Energy Co.*, 44 FERC ¶ 61,288, ¶ 61,194 (1988); *Electrodyne*, 32 FERC at ¶ 61,279.

If the use of thermal energy is uncommon and the thermal host is the cogenerator itself, or its affiliate, only then will FERC inquire into the economic viability of the thermal use. *See Electrodyne*, 32 FERC at ¶ 61,279. Specifically, the cogenerator is required to provide evidence that "the output would be economically justified in an independent business setting." *Id.* at ¶ 61,278. That is, the cogenerator must show that the thermal use is itself profitable without subsidy from the sale of electricity. FERC imposed this requirement on affiliated thermal hosts to prevent cogenerators whose thermal outputs have no established market from pawning off their thermal energy for an impractical purpose, while retaining their QF status and concomitant right to sell power at avoided cost rates. *See id.*

FERC's certification process occurs prior to the construction of the facility, and QF status is granted or denied based on the representations in a facility's application. The regulations provide, however, that FERC may revoke the QF status of a previously-certified facility if the facility, when operational, fails to comply with any of the statements in its application. *See* 18 C.F.R. § 292.207(d)(1).

Brazos challenges Tenaska's certification as a QF. Tenaska and Brazos entered their Power Purchase Agreement ("PPA") in 1993, which obligated Brazos to purchase electric power from Tenaska for twenty-three years, with a seventeen-year rollover, at prices fixed in the PPA. This was not a situation where Brazos was compelled under PURPA to purchase electricity from a QF. Rather, both parties were equally interested in Tenaska's becoming certified as a QF. Tenaska wanted to qualify for PURPA benefits. Brazos wanted the

best rates. According to Philip Segrest, Brazos' attorney at the time, the only power sources in Texas were public utilities and QFs. As a QF, Tenaska would only be able to charge rates up to Brazos' avoided costs. The public utilities, however, were currently charging rates above Brazos' avoided costs. Thus, because Tenaska's rates were favorable and because the option of building its own plant was impractical, Brazos "insist[ed] that the PPA be certified by the [Public Utility Commission of Texas] pursuant to PURA [the Public Utility Regulatory Act] . . . ." Affidavit of Philip Segrest. Under PURA, certification of power purchase agreements was permitted only if the power was being purchased from a QF, as that term was defined in PURPA. *See* Tex. Rev. Civ. Stat. Ann. art. 1446c (West Supp. 1994) (repealed 1995).

Therefore, on October 20, 1994, Tenaska applied to FERC for QF certification, obviously with Brazos' blessing. According to its application, Tenaska intended to sell its electrical output to Brazos, while its thermal output, steam, was to be converted into distilled water for sale to "a third party." FERC published notice of Tenaska's application in the Federal Register but received no protests or requests for interventions to Tenaska's certification. Therefore, on January 13, 1995, the Commission granted Tenaska QF status. In doing so, FERC determined, in relevant part, that Tenaska fulfilled its ownership requirement that utilities own less than 50% equitable interest in the facility. More importantly, FERC also concluded that the conversion of steam to distilled water was a common industrial process and application of thermal energy for that use was, therefore, presumptively useful.

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Tenaska entered into an arrangement with the City of Cleburne (the "City") in which Tenaska would (1) purchase the City's potable water for use in its steam generator, (2) recover the reject water stream from the steam generator's boiler makeup water treatment system and use it to supply the distilled water system, (3) sell the distilled water to the City, and (4) purchase effluent water from the City's wastewater treatment facility for use in its cooling tower. Under this arrangement, the City gave Tenaska a ten-dollar credit on its water bill for its production of the distilled water, and the City was obligated to construct the facilities necessary for transporting both the effluent water to Tenaska and the distilled water from Tenaska. The City was responsible for the initial financing of the construction, including the issuance of tax-exempt municipal bonds, for which Tenaska would reimburse the City in monthly payments when the debt service was owed. The facility became operational in January 1997.

The City had originally agreed to purchase Tenaska's distilled water in order to attract industries to an industrial park near Tenaska's facility, by offering the ready supply of distilled water for sale as process water. Water which was not resold was to be used to augment the flow of Buffalo Creek, a stream running near the City's business district whose stagnant waters were encouraging nuisance conditions and an increased mosquito population. While negotiations continued with potential occupants of the industrial park, the City ran into difficulty garnering permits from the Environmental Protection Agency to increase Buffalo Creek's flow with distilled water. Initially, therefore, the City had no specific use for the distilled water it was purchasing

from Tenaska, and it released its purchase into the City's sewer system. An occupant of the industrial park began purchasing the distilled water in September 1997.

On August 22, 1997, Brazos filed with FERC a motion and petition for revocation of Tenaska's QF status. According to Brazos, the use of Tenaska's thermal output for the production of distilled water had not proven to be "useful." The presumption of usefulness on which Tenaska's QF status was certified, Brazos argued, was rebutted by actual operation of the facility — notably, by the fact that the City paid only ten dollars a month for thousands of gallons of water and then dumped the water in the sewer. Meanwhile, Brazos was being forced under the PPA to pay fixed rates which, five years into the deal, were no longer below the market price. In addition, Brazos contended that Tenaska did not satisfy the ownership requirements for QF status. Although utilities owned less than 50% of Tenaska, Brazos alleged that the utilities' 45% interest gave them effective control in a voting procedure requiring a 70% vote to take action.

FERC denied Brazos' motion. FERC stated that once it determines the proposed use of thermal energy is common, it presumes the thermal energy is useful. FERC would not inquire thereafter into how the thermal host used its purchase, nor would it question whether the cogeneration facility was actually making money from its sale. FERC also found that Tenaska satisfied the ownership requirements for QF status, noting that the utilities' 45% interest was insufficient to effect day-to-day action without the votes of 25% of the non-utility owners. Additionally, the Commission noted that Tenaska's

ownership structure had not changed since its certification, and because Brazos failed to object then, its complaint now was untimely.

Subsequently, Brazos filed a request for rehearing and its request was denied. Brazos now petitions this Court for review of FERC's order denying the revocation of Tenaska's QF status.

II.

We must affirm FERC's order unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The scope of review under this standard is narrow; it does not authorize a reviewing court to substitute its judgment for that of the agency. *See Motor Vehicles Mfrs. Ass'n v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983). Rather, we must examine " 'whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.' " *Id.* (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 282, 285, 95 S. Ct. 438, 42 L. Ed. 2d 447 (1974). Where an agency has considered the relevant factors and provided a satisfactory explanation for its actions, its decision will be upheld.

III.

Noting that FERC regulations allow for post-operational challenges to a QF's certification, Brazos maintains that Tenaska is not entitled to benefits under PURPA because, after its facility was certified and became operational,

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Tenaska failed to uphold the regulatory requirements for QF status in accordance with projections contained in its application for QF certification. Brazos advances the same arguments it did below: the Commission should revoke Tenaska's QF status because the production of distilled water has not proven to be useful, and because Tenaska does not meet PURPA's ownership requirements. We address each contention in turn.

A. Useful Thermal Output

The thrust of Brazos' argument is that the Commission's precedent has not established an irrebuttable presumption of usefulness. Brazos does not take issue with the use of the presumption during certification, before the facility is even built; then, Brazos reasons, the Commission is justified in relying on hypothetical facts and an applicant's claim that, because the proposed thermal use is common, the thermal energy will be useful. Rather, Brazos asserts that the Commission was obligated to consider post-operational facts that could rebut the presumption of a thermal output's usefulness. Specifically, Brazos avers first that, although Tenaska represented in its application for QF status that distilled water would be produced for sale to a third party, the sale of water to the City is a "sham" sale designed only to retain PURPA benefits; it is not a sale serving an independent business purpose that could be economically justified. Second, Brazos contends that the water was not useful because before the City found a purchaser, it was pouring the water in the sewer.

In response, FERC asserts that Tenaska continues to satisfy PURPA's regulatory requirements, as represented in its application for QF status. First, Tenaska's sale of water was one piece of a legitimate, integrated financing package. Second, Tenaska's thermal energy has been useful since the day it was certified, for Tenaska has used "an established technology to produce a common product with an existing market." *Arroyo*, 63 FERC at ¶ 62,545 n.4. According to the Commission, there is no statutory or precedential requirement that, upon the facility's operation, it examine how each individual thermal host is using its purchases or how economically sound every transaction turned out to be. In fact, FERC argues, doing so would undermine its directives under PURPA, for conditioning the maintenance of QF status on investigations into the economics of a thermal host's purchase would impede the development of cogeneration. We agree that Brazos has misconstrued the Commission's prior holdings. Further, to the extent that the present factual scenario differs from that of the Commission's precedents, FERC's use of its presumption here furthers its congressional mandate under PURPA consistently with its regulations promulgated thereto.

The Commission has consistently refused to inquire into the economics of common thermal applications to rebut the presumption of a thermal output's usefulness. *See Polk Power Partners, L.P., et al.*, 61 FERC ¶ 61,300, ¶ 62,128 (1992) ("We think it better, once a thermal process has been found to be common, to refrain from second-guessing the decision to use cogenerated thermal energy in a particular industrial process and in a particular manner."); *Arroyo II*, 63 FERC at 62,546 (stating that, when a cogenerator proposes

a common application for its thermal energy, "the Commission does not perform an economic analysis" because "[a] contrary approach would act to discourage the development of the cogeneration industry"). So too has the Commission refused to examine the economics of a particular thermal host's ultimate use of its purchase. *See Brooklyn Navy Yard Cogeneration Partners, L.P.*, 74 FERC at ¶ 61,015, ¶ 61,046 (1996) (stating that, if the thermal application is common, FERC "will not inquire further into how the [end] product is being used [by the thermal host]"); *Arroyo Energy, L.P. (Arroyo I)*, 62 FERC ¶ 61,257, ¶ 62,722-23, *reh'g denied* 63 FERC ¶ 61,198 (1993) (concluding that it is the common nature of the industrial or commercial process, not the use to which the product is put, that determines that the thermal energy is useful).

In *Bayside II*, for example, a utility challenged the cogenerator's proposed application of its thermal output to create distilled water, arguing that the proposed thermal host's intended use of the water was not economically viable and that the cogenerator's thermal output was therefore required to serve "an independent business purpose with some economic justification." *Bayside II*, 67 FERC at ¶ 62,006 (internal citation omitted). Noting that the distillation of water was a common application, and thus the thermal output presumptively useful, the Commission rejected this argument:

> [The utility] would have the Commission view this "presumption" as an evidentiary presumption that is rebuttable upon the submission of economic evidence by a party opposing

> certification. But this has never been the Commission's intention or practice. Rather, the Commission, upon a finding that the usefulness of a thermal application has been established by common practice, is making a finding that practice has established that a particular use of cogenerated thermal energy is economic. It thus "presumes" that the thermal output is useful; there is no need to engage in a further inquiry into the usefulness of the particular output. In other words, when the Commission has found a use to be common, there is no need to determine whether a particular use of a particular applicant's output would be economically justified.

Id.

Given the consistency with which FERC has denied further inquiry into common thermal applications, nothing in these precedents persuades us that FERC's presumption of usefulness is rebuttable, even post-operation, by the two sets of facts Brazos presents. Brazos asserts first that the Commission should have examined the economics of Tenaska's Distilled Water Supply Agreement with the City and applied the independent business purpose test to that transaction. For this proposition, Brazos relies on *LaJet Energy Co.*, 43 FERC ¶ 61,288 (1988), which was decided before the Commission deemed the distillation process common. In *LaJet*, the Commission stated that "the thermal application, here the distilled water process, must be economically viable on its own to be considered 'useful,' economic viability meaning that anticipated revenues of the

distilled water process should be higher than anticipated expenses." 43 FERC at ¶ 61,790. As noted above, however, the Commission has steadfastly refused to examine the economic viability of transactions in common applications, noting that it "looks at the economic viability of the use of thermal output to assess whether the energy is 'useful' only in very limited circumstances," *Bayside II*, 67 FERC at ¶ 62,006: only when the cogenerator's thermal host is an affiliate (or the cogenerator itself), and then only when the cogenerator has proposed an uncommon application. *See LaJet*, 43 FERC at ¶ 61,790; *Electrodyne*, 32 FERC at ¶ 61,278. Such was the case in *LaJet*, where FERC examined an affiliate's use of what was, in 1988 anyway, a novel thermal application. It was for that reason that the Commission applied the independent business purpose test for affiliate use of novel applications, rather than the presumption of usefulness for non-affiliate use of common applications.

Brazos is correct, however, that the precedents FERC relies upon in this case focus on FERC's initial certification of cogenerators, not the revocation of QF status after the facility is operational. *Kamine/Besicorp Allegany, L.P.*, 63 FERC ¶ 61,320 (1993), is instructive to Brazos' complaint. There, the cogenerator applying for QF status entered a contract to sell its thermal energy, steam, to a non-affiliate distillation plant. The distillation of water was considered an uncommon application at the time, but because the cogenerator had already entered an arm's-length contract with its thermal host, it satisfied the test for non-affiliate use of uncommon applications. Relying on *LaJet*, the public utility requested that the Commission review the cogenerator's contract to

determine if the sale was in fact "useful," because the cogenerator had not included the contract as part of its QF application. The Commission refused to review the contract, but not because the cogenerator had provided specific evidence of an arm's-length market. Instead, the Commission held that,

> [G]iven that we now have seen at least four applications, other than Kamine's, proposing to distill water with the assistance of the thermal output of a cogeneration facility . . . , we believe that the distillation of water is a common industrial process, and that ultra-pure or distilled water is a common product; thus, the distillation of water is common for purposes of determining usefulness . . . .
>
> Because the thermal energy output of the Kamine facility is presumptively useful, the Commission has no need to review the contracts between Kamine and the non-affiliated purchaser of the facility's thermal output.

Id. at ¶ 63,158 (footnote omitted). Similarly, the City in the instant case is a non-affiliated purchaser of a product produced by a common application. Further, as in *Kamine*, a questionable thermal energy contract was available for the Commission to review to establish whether the distillation of water met *LaJet*'s stringent independent business purpose test. As Brazos points out, Tenaska's contract with the City was in place when it applied for certification as a QF. Because Tenaska was proposing a common application, however, it

was not required to submit economic evidence. *See Bayside Cogeneration, L.P. (Bayside I)*, 66 FERC ¶ 61,259, *reh'g denied*, 67 FERC ¶ 61,290, ¶ 61,631 (1994) (stating that "applications involving water distillation . . . need not be accompanied by evidence of arm's-length contracts . . . or economic viability"). Further, if Brazos had requested such evidence, as it does now, the Commission would have declined to review it. PURPA and its implementing regulations require only that the thermal energy be useful; they do not demand that the sale of every end-product be profitable. *See Bayside II*, 67 FERC at ¶ 62,006 ("There is no statutory requirement that the Commission find that the thermal output is being used in an economic manner."). Said differently, the issue is not whether the cogenerator makes money from its common application, but that, because there is a market for the application, it is capable of doing so. *See id.*

The Commission has previously opined that treating its presumption as rebuttable would be inconsistent with PURPA's goals, in that "[p]roviding an opportunity for evidentiary hearings before the Commission . . . would seriously impede the very development of cogeneration . . . that Congress sought to facilitate." *Id.* at 62,006 n.5 (quoting *American Paper Institute, Inc. v. American Electric Power Service Corp.*, 461 U.S. 402, 420 (1983)) (internal quotations omitted). Nonetheless, even if we were to look behind the presumption here, we, like the Commission, are not persuaded that the sale to the City is a sham. Tenaska correctly points out that it received much more than ten dollars in its transactions with the City, for the Distilled Water Supply Agreement was only one piece of their

arrangement's puzzle: Tenaska purchased potable water from the City for use in its steam generator, the reject stream from the generator was turned into distilled water, the City purchased the distilled water to attract industrial customers to an adjacent industrial park, the plant's blowdown water was transported to the City's sewage treatment center, and Tenaska purchased the treated sewage effluent from the City for use in the cogenerator's cooling tower. In addition, Tenaska received tax abatements, as well as access to the City's debt for construction of its water facilities so all of this could take place. Seen in the context of a complex project financing, Tenaska's arrangement with the City garnered it more than ten dollars a month. Thus, as proposed in its QF application, Tenaska has sold its product to a third party.

In addition to the economics of Tenaska's transaction with the City, Brazos urges the Commission to examine the City's use of the distilled water during its first year of operation because, according to Brazos, the City's actual use would rebut the Commission's initial presumption of the thermal energy's usefulness. Relying heavily on *Arroyo II*, 63 FERC ¶ 61,198 (1993), Brazos contends that, before determining that a thermal output is useful, the Commission must be satisfied that the thermal host's use of its purchase is a bona fide industrial or commercial use. When Tenaska first became operational, it was pouring its distilled water into a sewer, which Brazos maintains was not a bona fide use and renders the thermal energy used to create the water non-useful. Brazos contends that the Commission's failure to take into account the City's actual use of the water was an unexplained departure from its precedents.

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In *Arroyo II*, the cogenerator's thermal output, steam, was to be used in absorption refrigeration (AR) equipment to provide ice to an adjacent ice rink. The utility complained that the use of thermal output to help create and maintain an ice rink was a novel use requiring application of the independent business purpose test. The Commission declined to apply the test because it found that AR technology was a common use for steam, and the steam was therefore useful. Brazos, however, relies on several passages in the opinion as evidence that the Commission has tempered its presumption of usefulness by also examining the proposed end-use to which the thermal product would be put:

> Our review of the evidence compiled in this proceeding confirms that the proposed use of the Arroyo [cogeneration] facility's thermal output for refrigeration purposes is indeed *bona fide*. SDG&E [the utility] presents us with no new reason to upset our earlier determination that the technology to be applied by Arroyo, *as well as the end product*, are established and, accordingly, that the thermal output of the facility is presumptively useful.

Arroyo II, 63 FERC at ¶ 62,545 (citation omitted) (Brazos' emphasis added). This passage does not support Brazos' contention that FERC examines the thermal host's end-use of its purchase in determining the usefulness of a cogenerator's thermal output. It is the cogenerator's use of thermal energy that must be bona fide, not the thermal host's end-use of the end-product, and the cogenerator's use is bona fide when it is common in the industry. Thus, the passage

states that the thermal energy was useful because the thermal output (steam) was put to a bona fide use in a common application (AR technology) and created a common product (ice). This passage does not say that the cogenerator's thermal energy was useful because the thermal host's use of ice to build an ice rink was bona fide. The passage does not refer at all to the thermal host's end-use of the thermal product. Nor should it. As the Commission has noted, "if a cogenerator produces a product that has already met the Commission's usefulness requirement, there is no further inquiry to determine if the product is being used by the recipient for a common purpose." *Brooklyn Navy Yard*, 74 FERC at ¶ 61,046.

In this way, Brazos' complaint that the distilled water was not "useful" misses the point. The distillation of water is common, so the steam used to create it is useful. The use an unaffiliated thermal host makes of its arm's-length purchase is irrelevant. *See Arroyo I*, 62 FERC at ¶ 62,723 ("The fact that this is the first instance before the Commission in which this common refrigeration technology is associated with a common refrigeration product for end-use in an ice rink is irrelevant."). This is because the Commission, as the arbiter of "usefulness," has defined the concept in terms of economics. If an application is common, the technology is established and there is a market for the product. If the technology is established and there is a market for the product, that which is used in the application to create the product is "useful." Once the energy used in the established technology or the product with the established market is purchased by a thermal host, FERC has no further involvement. The purchaser bears the market risk of its purchase, not the seller, and whatever use or profit the

purchaser makes of its purchase, whether by pouring it in a sewer or reselling it, is of no moment to the seller. *See Bayside II*, 67 FERC at ¶ 62,006 n.7 (stating that "PURPA does not require that the Commission ensure that a thermal host make as much money as possible, *or make any money at all*; all PURPA requires is that the Commission ensure that the thermal host takes useful thermal energy that is used for industrial, commercial, heating, or cooling purposes." (internal quotations omitted) (emphasis added)). The point is that the seller has successfully sold its output in an arm's-length market and the purchaser has access to the same market for resale. There is, of course, proof of this point in the instant case — two weeks after Brazos filed its motion and petition for revocation, the City found a purchaser for its distilled water from among those industries it was trying to attract with the supply of that water.

Brazos also points us to FERC's response to the utility's suggestion in *Arroyo II* that the Commission's presumption of usefulness would allow certification of a QF proposing to throw away the product of a common application "in an underhanded effort" to meet the regulatory requirements. The Commission stated:

> [T]he Commission does not apply the presumption of usefulness so cavalierly and, as explained above, must be assured that the thermal energy output is being used in a bona fide manner for a legitimate industrial, commercial, heating, or cooling purpose.

Arroyo II, 63 FERC at ¶ 62,545 n.4. Again, the Commission's response to the utility's hypothetical provides no support

for Brazos' assertion. First, a cogenerator seeking QF status by proposing that it throw away its own common end-product is markedly different from an unaffiliated, third-party thermal host having to waste its arm's-length purchase from a QF because of protracted negotiations with buyers and permit problems. That is, a cogenerator's use of thermal energy is obviously not "bona fide" if its intention from the outset is to dispose of it itself. However, a cogenerator's use of thermal energy is not "mala fide" if a third-party purchaser of the output, through no fault of its own, cannot resell its purchase.

Second, Brazos neglected to include the quoted footnote's final sentence: "The flaw in SDG&E's argument is that Arroyo proposes to apply the thermal energy output of its facility in a useful manner using an established technology to produce a common product with an existing market." *Id.* Similarly, Brazos again fails to recognize that Tenaska was using its thermal output (steam) in an established technology (distillation) to produce a common product (distilled water) with an existing market (the City).

Although this case presents us with what, at first blush, appears to be the proverbial "peppercorn" scenario — a party paying ten dollars for thousands of gallons of distilled water that for nine months it poured into the sewer — we are, for a number of reasons, hesitant to look beyond FERC's presumption of usefulness to release Brazos from its contractual obligations. First, Tenaska and the City entered an arm's-length contract, one amongst many contracts in which the risks and benefits of the typical project finance arrangement were traded. That Brazos now finds itself paying above-market prices for electricity because it entered a

"front-loaded" contract fails to undermine the utility of the Commission's presumption of the usefulness of thermal energy in common applications. A front-loaded contract means that the utility's payment rates are determined at the time the obligation to buy from the cogenerator is incurred, rather than at the time of delivery. Such contracts are often used because they allow the QF to finance the construction and operation of the facility in the early years of the contract. As the Ninth Circuit observed in *Independent Energy Producers Ass'n, Inc. v. California Pub. Util. Comm'n*, 36 F.3d 848, 858 (9th Cir. 1994), such contracts have been upheld notwithstanding the recognized risk that the prices set by the contract might at times exceed the utility's actual avoided costs, because "certainty as to rate was important." By ensuring a predictable flow of income, such contracts encourage the development of alternative facilities that might never be built. In FERC's words:

> The Commission recognizes this possibility [that current avoided costs might be lower than the rates provided in the contracts] but is cognizant that in other cases, the required rate will turn out to be lower than the avoided cost at the time of purchase. . . . Many commentators have stressed the need for certainty with regard to return on investment in new technologies. The Commission agrees with these . . . arguments, and believes that, in the long run, "over estimations" and "under estimations" of avoided costs will balance out.

Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of PURPA, 45 Fed.

Reg. 12224 (1980) (quoted in *Independent Energy Producers Ass'n*, 36 F.3d at 858).

Second, allowing post-operation rebuttal of FERC's presumption of a thermal output's usefulness on these grounds would impede the development of cogeneration facilities, a development PURPA was enacted to encourage. *See Arroyo II*, 63 FERC at ¶ 62,546 (explaining that performing economic analyses on common applications would discourage cogeneration). By sanctioning such rebuttal, we would ensure that every time the market for electricity fluctuated and the utility that was the QF's only market recipient was suddenly displeased with its rates, the utility could back out because it thought either the QF or the thermal host was not being as economically wise or efficient as it should be. This scenario poses several problems.

Owners of QFs would have little incentive to sell electric energy if they had to go through an evidentiary hearing before FERC in Washington, D.C., every time a utility claimed someone else was behaving inefficiently with a common application. *See Polk Power Partners*, 61 FERC at ¶ 62,128 (refusing to review evidence of economic inefficiency because to do so would allow third parties to "compel a hearing simply by the submittal of evidence purporting to show that a thermal process is not the most economic, no matter how common the process"). Presumptions are over-inclusive by definition. FERC's decision to apply one strictly in this case neither contravenes PURPA's mandates nor supercedes [sic] the discretion afforded agencies in interpreting their own regulations. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837,

844, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). PURPA, and FERC's regulations promulgated thereto, require only that a cogenerator produce useful thermal energy for legitimate processes. *See* 16 U.S.C. § 796(18)(A); 18 C.F.R. § 292.202. Neither the statute nor the regulations insist or presuppose that FERC should engage in such heavy-handed oversight as to keep tabs on QFs' arm's-length purchasers. If we were to hold otherwise, we would embrace the very form of micro-management that the Commission has determined QFs are supposed to be freed from, and we would "impute to Congress a purpose to paralyze with one hand what it sought to promote with the other." *Clark v. Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480, 489, 68 S. Ct. 174, 92 L. Ed. 88 (1947).

More importantly, FERC's presumption of usefulness is meant to enable cogeneration facilities to obtain financing. The presumption provides certainty for investors that their investment is duly certified under PURPA and entitled to the benefits of PURPA's statutory imperatives, including the presence of a utility to purchase the facility's output. Because the value of a facility's hard assets is usually less than the project debt, debt repayment and anticipated equity returns depend on performance under project contracts. The contracts constitute the framework for project viability because the ability of the project sponsor to produce revenue from project operation is the foundation of a project financing. The PPA is the principal source of project revenue. Therefore, banks lend money for construction and permanent financing on the strength of the utility's obligation to purchase power from a QF. Revocation of a facility's QF status releases the utility from its obligation under the PPA. It leaves the facility without a market recipient and thus without a revenue source for debt repayment. We would be hard pressed to imagine

the investor who would contribute to a project so susceptible to such a scenario. In sum, both FERC's precedents and PURPA's mandates persuade us that Tenaska continues to produce useful thermal energy in accordance with the representations in its application for QF status.

B. Ownership Criteria

In order to obtain QF status under PURPA, a cogeneration facility must not be owned by persons primarily engaged in the generation or sale of electric power. *See* 16 U.S.C. § 796(18)(B). The Commission clarified this requirement, determining that electric utilities may own no more than 50% of the equity interest in a QF. *See* 18 C.F.R. § 292.206(b). FERC's regulations thus equate "ownership interest" with "equity interest," but they do not define the term "equity interest." *See Ultrapower 3*, 27 FERC ¶ 61,094, ¶ 61,183 (1984). Cases discussing the Commission's ownership criteria emphasize the stream of benefits accruing to each partner, but the voting interests of each partner have also been examined to avoid a utility partner's manipulation of those benefits. *See id.* at ¶ 61,184. Accordingly, "a utility partner may not have more than 50% control of a qualifying facility." *Brooklyn Navy Yard*, 74 FERC at ¶ 61,048.

According to Brazos, Tenaska has not satisfied the ownership criteria for QF status because utilities have effective control over the facility's operation. Affiliates of three utilities own a 45% interest in Tenaska and have a 38.9% voting interest in the facility, in conformity with the regulatory limits. Before FERC, however, Brazos contended that the utilities' 45% interest in the facility gives them effective control over

the facility's operation, because a 70% vote of Tenaska's Executive Review Committee is needed to take significant actions.[1] The Commission disagreed, pointing out that the utility affiliates would still need the approval of the non-utility owners to take significant action. The Commission also pointed out that Tenaska's ownership structure had not changed since it was certified as a QF. Because Brazos was listed as the utility-purchaser in QF application and failed to object when the application was noticed for comment, the Commission determined that Brazos' challenge was untimely.

In response, Brazos argues that the utility affiliates' 45% interest is enough to *block* significant action, thereby giving them effective control. Further, Brazos contends that it should not be faulted for failing to object because it was relying on Tenaska's contractual obligation to meet QF standards.

Brazos' arguments are unpersuasive. All certification orders granting QF status state the following: "To the extent that facts or representations which form the basis for this order change, this order cannot be relied upon." *Tenaska IV Texas Partners, Ltd.*, 70 FERC ¶ 62,026, ¶ 64,081 (1995). Tenaska's ownership structure has not changed since it applied for and was granted QF status. It follows that the order may still be relied upon. Brazos' contention that it was relying on Tenaska to meet QF standards does not explain why it waited two and a half years after Tenaska's certification to object. We agree with the Commission that

1. It is unclear why Brazos' "effective control" argument focuses on the utility-affiliates' ownership interest rather than their voting interest.

"[a]llowing such belated challenges to QF certifications despite unchanged facts would undermine the contractual reliance QFs need in order to finance and build their projects." *Brazos Electric Power Cooperative v. Tenaska IV Texas Partners, Ltd.*, 85 FERC ¶ 61,097, ¶ 61,348 (1998).

Briefly, even if we were to give Brazos the benefit of the doubt, its challenge is still without merit. As noted, FERC's ownership criteria are intended to prevent utilities from diverting to themselves the stream of benefits flowing from a QF, such that the utilities would gain some undue advantage vis-a-vis non-utility partners. *See Dominion Resources, Inc.*, 43 FERC ¶ 61,079, ¶ 61,251 (1988). In order to accrue such benefits, "control" requires action, not inaction. That is, a minority interest's ability to *block* significant actions does not garner the benefits the controlling interest can manipulate by *taking* significant actions. Furthermore, if the ability to block significant action constituted "control," then Brazos is actually contending that utilities may not have more than 30% control — a proposition that finds no support in the Commission's precedents. *See id.* at ¶ 61,251 (stating that "a facility will meet the ownership requirements of PURPA . . . so long as the interest in the stream of benefits and control by a utility or utilities, by whatever mechanism used, does not exceed 50%"). The utility affiliates' equity and voting interests in Tenaska satisfy the Commission's ownership requirements for QF status.

IV.

For the foregoing reasons, we DENY Brazos' petition for review in No. 98-60684; No. 98-60568 is DISMISSED.

Appendix A

EMILIO M. GARZA, Circuit Judge, specially concurring:

The majority opinion reflects a wholesale endorsement of both the result reached by the Federal Energy Regulatory Commission ("FERC") and the methodology used to reach that result. I agree with the former, but not with the latter. Accordingly, I concur in the result reached by the majority, but write separately because the method by which FERC disposed of this case could, if repeated, produce results clearly in conflict with the language and intent of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. § 823a *et seq.*

PURPA was passed in response to the 1970s oil crisis and the corresponding fear of excessive American reliance on foreign oil. As part of PURPA's contribution to a diverse set of incentives passed simultaneously,[1] Congress chose to

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1. President Carter signed PURPA as part of a larger undertaking, called the National Energy Act of 1978 (NEA), which was Congress's response to the President's declaration that the energy crisis was the "moral equivalent of war." The package included the Energy Tax Act of 1978, Pub. L. 95-618, 92 Stat. 3174 (1978), the National Energy Conservation Policy Act, Pub. L. 95-619, 92 Stat. 3206 (1978), the Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95-620, 92 Stat. 3289 (1978), and the Natural Gas Policy Act of 1978, Pub. L. 95-621, 92 Stat. 3351 (1978). *See FERC v. Mississippi*, 456 U.S. 742, 745 n.2, 102 S. Ct. 2126, 2130 n.2, 72 L. Ed. 2d 532 (1982). Overall, the NEA was designed to promote conservation and increased efficiency in the use of existing resources as well as the production of alternative energy sources. *See generally* SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES, 95TH CONG., ENERGY INITIATIVES OF THE 95TH CONGRESS 5 (Comm. Print 1979) ("The cornerstone of national energy policy is that the growth of energy demand must be restrained through conservation and improved energy efficiency.").

encourage cogeneration because the increased energy efficiency from cogeneration would presumptively result in decreased reliance on foreign fossil fuels. *See generally American Paper Inst. v. American Elec. Power Serv.*, 461 U.S. 402, 415-16, 103 S. Ct. 1921, 1923, 76 L. Ed. 2d 22 (1983); *FERC v. Mississippi*, 456 U.S. 742, 745, 102 S. Ct. 2126, 2129, 72 L. Ed. 2d 532 (1982). Properly constructed cogeneration facilities were desirable because while excess energy was inevitably produced as a by-product to electricity, if that excess energy was used rather than wasted, the efficiency of electricity production plants would improve. *See Liquid Carbonic Ind. Corp. v. FERC*, 29 F.3d 697, 699 (D.C. Cir. 1994) ("[T]he production of electricity frequently results in the production of thermal energy as a byproduct; by using small amounts of additional fuel, cogenerators can produce large amounts of thermal energy. . . . The additional thermal energy can be used instead of discarded as waste."); *TEC Cogeneration, Inc. v. Florida Power & Light*, 76 F.3d 1560, 1564 n.2 (11th Cir. 1996) ("Cogeneration can be an efficient use of fuel because a cogeneration facility (unlike some more traditional power plants) can utilize thermal energy that might otherwise be a wasted by-product in the production of electricity."); *Independent Energy Producers Ass'n v. California Public Utilities Comm'n*, 36 F.3d 848, 849 n.2 (9th Cir. 1994) ("Because cogeneration reuses waste heat to produce additional energy, it is a particularly efficient method of generating electric energy."). The construction of qualifying cogeneration facilities ("QFs") was not the end Congress sought, but rather one of many means to produce the end of greater energy efficiency in electricity production. *See, e.g.*, Richard Cudahy, *PURPA: The Intersection of Competition and Regulatory Policy*, 16 ENERGY L.J. 419, 421

(1995) ("PURPA encouraged energy conservation and energy efficiency *through* measures such as cogeneration.") (emphasis added).

The language Congress provided to effectuate this desire for energy efficiency through cogeneration was clear and concise. Only those facilities which produced both

> (I) electric energy, and
>
> (ii) steam or forms of *useful* energy (such as heat) which are used for industrial, commercial, heating, or cooling purposes

were deemed "cogeneration facilities" worthy of benefits. 16 U.S.C. § 796(18)(A) (emphasis added). This language clearly expressed the congressional purpose: a power production facility was only of the type Congress wanted to promote if it produced both electricity and another form of "useful" thermal energy.

With this general restriction in mind, Congress gave FERC the responsibility to issue rules "as it determines necessary to encourage cogeneration." 16 U.S.C. § 824a-3. Congress broadly outlined which specific "cogeneration facilities" would qualify for benefits. First, "qualifying cogeneration facilities" must meet specific FERC "technical" regulations, to be determined, "respecting minimum size, fuel use, and fuel efficiency." 16 U.S.C. § 796(18)(B). Second, QFs must meet "ownership" restrictions, not being "owned . . . by a person not primarily engaged in the generation or sale of

electric power." *Id.* Those facilities which meet the qualifying criteria receive tremendous financial benefits.[2]

FERC regulations have since delineated both the technical and ownership requirements for facilities to be termed QFs. The technical restrictions integrate the Congressional definition of "cogeneration" and further define "useful thermal energy" as, *inter alia*, thermal energy "[t]hat is made available to an industrial or commercial process." 18 C.F.R. § 292.202(h)(1). Accordingly, under FERC regulations, facilities must produce both electricity and thermal energy "made available to an industrial or commercial process" to satisfy FERC's QF technical requirements.[3]

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2. The benefits Congress had in mind to encourage the construction of cogeneration facilities were: (1) mandating that utilities purchase electricity from such QFs at above-market rates, and (2) exempting such facilities from much state regulation. *See* 16 U.S.C. § 824a-3; 16 U.S.C. § 824(I); *see also Southern California Edison Co. v. FERC,* 195 F.3d 17, 19 (D.C. Cir. 1999) ("Under PURPA, such facilities were exempt from certain regulatory controls, and they were assured a market by providing a right to interconnect with the local public utility and to receive rates, as prescribed by FERC, up to the full avoided cost of the utility."). These benefits can be tremendous. *See, e.g., New Charleston Power, L.L.P. v. FERC,* 56 F.3d 1430, 1433 (D.C. Cir. 1995) ("Southern California Edison estimated that, had it purchased power from a non-QF generating plant during the time petitioners' facility was out of compliance, it would have saved $7 million per year in purchased power costs.").

3. FERC technical regulations also mandate that at least 5% of QFs' total energy be devoted to producing their coproduct. *See* 18 C.F.R. § 292.205(a).

Since FERC was authorized to administer PURPA, we give its interpretation of the statute *Chevron* deference. *See WRT Energy Corp. v. FERC*, 107 F.3d 314, 318 (5th Cir. 1997) (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)). Accordingly, if PURPA speaks clearly on the precise issue in question, that plain meaning must govern; however, if PURPA's application to a particular issue is ambiguous, FERC's interpretation will be upheld so long as it is a "permissible construction" of the statute. *See id; American Airlines, Inc. v. Dep't of Transp.*, 202 F.3d 788 (5th Cir. 2000). Though this deference is significant, "courts are not obliged to stand aside and rubberstamp their affirmance of administrative decisions that they deem inconsistent with the statutory mandate or that frustrate the congressional policy underlying a statute." *Texas Power & Light Co. v. FCC*, 784 F.2d 1265, 1269 (5th Cir. 1986) (citing *NLRB v. Brown*, 380 U.S. 278, 291, 85 S. Ct. 980, 988, 13 L. Ed. 2d 839, 858 (1965)).

FERC considers whether a facility produces "useful" thermal energy and is, therefore, worthy of QF status, at two distinct occasions. First, at the initial certification stage, which occurs well before the facility is built, FERC considers whether a proposed facility would meet its technical and ownership guidelines.[4] In this context, FERC has established a

4. "[T]he Commission, in acting on an application for certification of qualifying status, essentially renders a declaratory order. That is, the Commission determines, based on the information in the application and the responsive pleadings, whether or not a facility, as described in the application, meets or does not meet the

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presumption that if coproduced thermal energy is used in an established technology or will produce a common product, it will not consider whether the co-product's production is useful. Rather, because the "common product" could theoretically be sold in the marketplace, FERC considers the co-product presumptively "useful" and certifies the facility.[5] *See Electrodyne Research Corp.*, 32 FERC ¶ 61,102 (1985) ("There is no hard and fast test for establishing the usefulness of a thermal energy output. However, the test is an economic test. Thus, common industrial or commercial applications are presumptively useful, regardless of the user's status."). The policy rationale behind this — that intensive intrusion into the use of the proposed facility's excess thermal energy could discourage the construction of cogeneration facilities

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statutory and regulatory requirements for qualifying status set forth in the Public Utility Regulatory Policies Act of 1978 (PURPA) and our implementing regulations." *Kamine/Besicorp Allegany L.P.*, 63 FERC ¶ 61,320 (1993).

5. FERC's determination that all thermal energy "made available to a common industrial or commercial process" is definitively and irrebutably "useful" is questionable. Notably, the statute does not define "useful" by reference to whether energy is used in for "industrial, commercial, heating or cooling" purposes. Rather, the plain terms of the statute mandate that the energy coproduct be forms of "useful energy . . . which are used for industrial, commercial, heating, or cooling purposes." 16 U.S.C. § 796(18)(A). Therefore, to fall within the plain terms of the statute, a facility's co-product must be *both* useful *and* used for industrial, commercial, heating or cooling purposes. Proving the latter does not necessarily, in all circumstances, make the former irrefutably true.

— is, even though in some cases arguably at odds with the statutory mandate, compelling. *See Arroyo Energy, L.P.*, 62 FERC ¶ 61,257 ("When an applicant submits a cogeneration proposal which uses thermal energy in an established technology or produces a common product, the commission does not perform an economic analysis. A contrary approach would act to discourage the development of the cogeneration industry.").[6] I agree with the majority that, in this context, FERC's construction of the statutory term "useful" is a permissible one.

FERC has a second opportunity to determine whether cogeneration plants meet QF criteria in the context of a petition to revoke QF certification. These petitions, which

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6. As the majority correctly notes, FERC has consistently utilized the presumption in pre-certification orders and justified it with this policy rationale. *See, e.g., Brooklyn Navy Yard Cogeneration Partners, L.P.*, 74 FERC ¶ 61,015 (1996); *Bayside Cogeneration, L.P.*, 66 FERC ¶ 61,259, *reh'g denied* 67 FERC ¶ 61,290 (1994); *Kamine/Besicorp Allegany, L.P.*, 63 FERC ¶ 61,320 (1993); *Arroyo Energy, L.P.*, 62 FERC ¶ 61,257 (1993); *Polk Power Partners, L.P.*, 61 FERC ¶ 61,300 (1992). Furthermore, both in this case, *see Brazos Elec. Power Cooperative v. Tenaska IV Texas Partners*, 83 FERC ¶ 61,176 (1998), and in another recent case, *see Pennsylvania Power & Light Co. v. Schuylkill Energy Resources, Inc.*, 83 FERC ¶ 61,188 (1998), FERC utilized the presumption in the context of petitions to revoke certification. *See Pennsylvania Power & Light*, 83 FERC ¶ 61,188 ("Indeed, the Commission looks at the economic viability of the use of thermal output to assess whether the energy is 'useful' only in very limited circumstances only when the thermal host is an affiliate of the cogenerator (or the cogenerator itself), an then only when the technology is previously unproven.").

can be brought at any time after a facility has been certified as a QF, are often brought years after certification by parties who are disadvantaged by the fact that the particular facility has gained QF certification.[7] *See, e.g., Pennsylvania Power & Light Company v. Schuylkill Energy Resources, Inc.*, 83 FERC ¶ 61,188 (1998) (addressing claim of a utility forced to overpay for electricity based on the fact that facility had been certified as a QF). When these petitions claim lack of compliance with FERC's technical requirements, FERC occasionally hears evidence to determine whether a facility is complying. For example, FERC will examine whether a facility has met the technical requirement that the thermal output of the facility be no less than 5% of the facility's total energy output. If a petitioner (whatever its motives) proves lack of compliance on this ground, FERC will revoke the facility's certification. *See id.* However, if a petition (like the one in the case at bar) is based not on the lack of 5% coproduction but rather on the lack of real-world "usefulness," FERC refuses to hear evidence, again relying on the irrebutable presumption that if the thermal energy is used in a common process, it is *ipso facto* "useful."

In this case, the majority is correct in rejecting Brazos's claim that any "usefulness" from cogeneration in the Tenaska facility is "flushed down the sewer." The evidence shows

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7. The majority's characterization of Brazos's motives for bringing this suit that it is seeking a way out of a contract which it freely signed but is no longer to its benefit is unquestionably accurate. However, this case is no more about money than most civil suits. The issue before FERC and before us whether Tenaska's Cleburne facility is a QF makes Brazos's motivation for bringing the suit irrelevant.

that the thermal energy produced by the Tenaska facility is used to distill water which is sold to the city or directed into Buffalo Creek to attract customers to an adjacent industrial park. Accordingly, the thermal energy produced by Tenaska is "useful" in any sense of the word, and we defer to FERC's interpretation.[8]

However, Brazos's allegations, when considered relative to FERC's treatment of petitions to revoke QF certification, beg the question: what if Tenaska's cogenerated energy *was* used to distill water which was promptly flushed down the sewer? Clearly, nothing "useful" would result from the cogeneration, but since the cogenerated energy was "used in a common process," FERC would rely on its presumption of usefulness and the facility would retain QF certification. I fully agree with the majority's statement that "PURPA and its implementing regulations require only that the thermal energy be useful; they do not demand that the sale of every end-product be profitable." However, under FERC's procedural rationale, the Commission cannot ever be sure that the thermal energy is "useful" in the everyday sense of the word.[9] In some cases, FERC's failure to even address

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8. Webster's Dictionary defines "useful" as, *inter alia*, "producing or having the power to produce good: serviceable for a beneficial end or object." *See* WEBSTER'S NEW INT'L DICTIONARY 2524 (3rd ed. 1993).

9. The majority asserts "the Commission, as the arbiter of 'usefulness,' has defined the concept in terms of economics" and concludes that "Brazos' complaint that the distilled water was not 'useful' misses the point. The distillation of water is common, so

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claims that a facility's thermal energy is not "useful" could contravene both the language and the intent of PURPA. *See Liquid Carbonic*, 29 F.3d at 706 ("Congress intended PURPA to encourage the development of cogeneration facilities . . . [but] [t]he encouragement of the goal must, but its nature, limit entry to those who actually further the goal by producing useful energy . . . .").

FERC's irrebutable presumption of usefulness is justified in the context of petitions for initial certification, upon which financing to build such facilities often depends. As the majority notes, in this context "[p]roviding for evidentiary hearings before the Commission . . . would seriously impede the very development of cogeneration . . . that Congress sought to facilitate." However, FERC and the majority

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the steam used to create it is useful." I disagree. PURPA contemplates that the thermal energy produced by cogenerators is "useful" in the sense that it is used in some beneficial way. Given that it passed PURPA in an effort to increase energy conservation and efficient electricity production, Congress could hardly have intended to promote facilities who coproduced thermal energy, used it in a "common process," and then completely wasted the product of that process. Because of the tremendous benefits PURPA provides QFs, it is profitable for a electricity generator to "cogenerate" in the sense of using its excess thermal energy to, for example, distill water, and then completely waste the distilled water. Even if the final product poured down the sewer, the "cogeneration" was still economically beneficial to the facility because of the tremendous benefits PURPA provides it as a QF. Yet Congress encouraged these facilities precisely so that the end product of their cogeneration would not be wasted. In this manner, FERC's procedural framework threatens to defy the language and spirit of PURPA.

exaggerate the possibility that an evidentiary hearing years after a facility has been in operation to determine whether the facility truly produces "useful" thermal energy would impede the initial development of the facility. Any hesitancy that this potential future evidentiary hearing might produce is mitigated, if not eliminated, by the fact that FERC already performs evidentiary investigations into other issues of technical compliance (for example, into the 5% mandate). The alternative to allowing post-certification evidentiary hearings on "usefulness," which currently exists, allows facilities to retain QF benefits even if they are not (in fact, even if they never were) the type of facilities to which Congress wanted to afford such benefits. In many cases, this is a clear departure from the statutory mandate, and therefore an impermissible construction of PURPA.

Tenaska has proven that the energy it produces as a co-product to electricity is "useful" in producing distilled water which benefits the community at large, and thus that the benefits afforded it as a QF are justified. Accordingly, I concur in the decision allowing Tenaska's Cleburne facility to retain QF status. However, I cannot agree with the majority's endorsement of the procedure by which FERC summarily dismissed this case. Congress wanted to encourage the production of cogeneration facilities because, in developing alternative sources of "useful" energy while producing electricity, they improved the energy efficiency of electricity generation facilities in particular and the nation in general. By establishing an irrebutable presumption that prevents it from ever examining whether a facility's co-produced energy is ever "useful," FERC has opened the door

to facilities who meet FERC's technical requirements but defy the language and spirit of PURPA.[10]

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10. Brazos refers to Tenaska's Cleburne facility as a "PURPA machine," i.e. a facility designed to generate PURPA revenues, not to produce a useful co-product. Several commentators have noted the influx of these facilities, which cogenerate merely to gain QF benefits and where the cogeneration is, ultimately, useless. *See, e.g.*, Douglas Gagax & Kenneth Nowotny, *Competition and the Electric Utility Industry: An Evaluation*, 10 YALE J. ON REG. 63, 77 & n.36 (1993) ("A 'PURPA machine' is a QF which would not exist except by virtue of the requirement that a utility purchase the power it creates. Such QFs are totally in contravention of the idealistic and optimistic purposes of the Public Utility Regulatory Policy Act of 1978."); Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry*, 1994 WISC. L. REV. 763, 782-83 (1994).

APPENDIX B — ORDER OF THE FEDERAL ENERGY REGULATORY COMMISSION OF THE UNITED STATES OF AMERICA DENYING REHEARING DATED AND ISSUED OCTOBER 21, 1998

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: James J. Hoecker, Chairman;
Vicky A. Bailey,
William L. Massey,
Linda Breathitt, and
Curt Hébert, Jr.

Brazos Electric Power Cooperative,
Docket No. EL97-56-001

Tenaska IV Texas Partners, Ltd.,
Docket No. QF94-84-004

Order Denying Rehearing
(Issued October 21, 1998)

Brazos Electric Power Cooperative, Inc. (Brazos) filed a request for rehearing of the Commission's May 18, 1998 order in this proceeding. *Brazos Electric Power Cooperative, Inc. v. Tenaska IV Texas Partners*, 83 FERC ¶ 61,176 (1998) (May 18 order). In that order, the Commission denied Brazos' request that we revoke the qualifying status of the qualifying facility (QF) owned by Tenaska IV Texas Partners, Ltd. (Tenaska). We will deny rehearing.

Appendix B

I. *Background*

Tenaska is the owner of a 284 MW cogeneration facility. The facility is located in Cleburne, Texas.[1] The thermal output of the facility is used to produce distilled water which is sold to the City of Cleburne, Texas. The electric power produced by the facility is sold to Brazos.

The facility was initially self-certified. March 25, 1994, notice of self-certification in Docket No. QF94-84-000. A notice of self-recertification was filed on October 18, 1994, in Docket No. QF94-84-001. On October 20, 1994, Tenaska filed an application for certification as a qualifying topping-cycle cogeneration facility. The application for certification, which was not opposed, was granted. *Tenaska IV Texas Partners, Ltd.*, 70 FERC ¶ 62,026 (1995). In that order it was found that:

> Tenaska IV will use the thermal output of the facility to produce distilled water for sale to a third party. Tenaska's application of the thermal output for this purpose is common and, thus, is presumptively useful. . . .

70 FERC at 64,081.

In its petition seeking revocation of Tenaska's QF status, Brazos alleged that: (1) the City of Cleburne pays only $10 a month for the distilled water from Tenaska's facility and has at times dumped the water down the sewer, which

1. The background of this proceeding is more fully described in the May 18 order.

according to Brazos showed that Tenaska's distillation of water has not proven to be "useful," thus rebutting the presumption of usefulness on which Tenaska's QF status was certified; (2) steam sent to the steam turbine fails to meet the sequentiality test of the Commission's regulations;[2] and (3) Tenaska does not satisfy the ownership requirements for QF status.

II. *May 18 order*

In the May 18 order, the Commission denied Brazos' request to revoke Tenaska's QF status, stating that the request was based primarily on the allegation that Tenaska's production of distilled water for sale to the unaffiliated City of Cleburne, Texas, is not "useful". The Commission noted that, in certifying Tenaska's facility as a QF, the Commission had found that the use of thermal output to produce distilled water was "presumptively useful".

In declining to find that Brazos had rebutted the finding that the use of the thermal output was "useful" the Commission stated:

> Brazos' request that we revoke Tenaska's QF status shows a profound misunderstanding about what the Commission means by "presumptively useful." Brazos would have us view this "presumption" as an evidentiary presumption which is rebuttable. But this has never been the Commission's intention or practice. The

2. 18 C.F.R. § 292.202(s) (1997).

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Commission, upon finding that the usefulness of a thermal application has been established by common practice, is making a finding that a particular use of cogenerated thermal energy is economic and it thus "presumes" that the thermal output is useful. Indeed, the Commission has stated that a more accurate way to describe its process is that it "assumes" that energy is useful within the meaning of the statute when it is used in a common process or used to produce a common product. *Bayside Cogeneration, L.P.*, 67 FERC ¶ 61,290 at 62,006 & n.4 (1994).

The Commission recognizes that there may be cases in which a particular facility, employing its thermal output for a common use, may not be economic. Likewise, in cases in which the theoretical economic viability of a facility employing a new technology is established by evidence in a proceeding (the independent business purpose test), it does not necessarily mean that the facility will make money on the thermal use, but means merely that the facility is in theory capable of making money using the technology. *Id.*

Moreover, the Commission, once satisfied that the proposed use of cogenerated thermal output in a particular manner is common, will not inquire further into how the product produced by the thermal output is being used, *e.g.*, into the economics of the application. *Brooklyn Navy Yard*

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Cogeneration Partners, L.P., 74 FERC ¶ 61,015 (1996).

> Here, Tenaska produces a product, distilled water, which has been found to be presumptively useful. The Commission will not look into the economics of its sale of the product, or into how the product is being used by the unaffiliated purchaser of the product.[3]

The Commission further found that Tenaska's facility satisfied the sequentiality requirement for a qualifying cogeneration facility as well as the ownership requirements for QF status. In making these findings, the Commission noted that neither the design nor ownership structure of Tenaska's facility had changed since the facility had been certified and that Brazos had challenged neither issue on certification.[4]

III. *Request for Rehearing*

On rehearing, Brazos argues that the Commission's decision denying revocation will encourage the development of "PURPA machines."[5] Brazos states that while the presumption of usefulness is established by Commission precedent, in prior cases the Commission has said that it will

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3. 83 FERC at 61,727.

4. *Id.* at 61,727-28.

5. Rehearing at 7.

entertain requests for revocation of QF status where a facility does not operate in accord with projections contained in the application for certification. Brazos also alleges that the product produced by the thermal output (or the thermal output itself) must actually be sold, and that the product must be put to a *bona fide* use. Brazos contends that the distilled water produced by Tenaska was not actually sold (because the City of Cleburne paid only $10 a month) and that the water was not put to a *bona fide* use (because the City of Cleburne did not have a purchaser for the water when it was first being delivered).[6] Brazos further alleges that the Tenaska facility would not qualify for waiver of the Commission's requirements for QF status.[7] Finally, Brazos alleges that the Tenaska's facility does not satisfy the ownership requirements for QF status, and that Tenaska has no right to rely on the Commission's certification of QF status even when there has been no change in circumstances.[8] Brazos concludes by asking the Commission to find that Tenaska has not operated its facility in accordance with its petition for certification or its notices of self-certification and, accordingly to revoke the facility's QF status.[9]

Discussion

This case involves the attempt of a utility-purchaser of QF power to have the QF status of the facility revoked. In

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6. *Id.* at 14-23.

7. *Id.* at 23-24.

8. *Id.* at 25-26.

9. *Id.* at 26.

our May 18 order we declined to do so. Nothing raised by Brazos on rehearing changes our conclusion. We address below only those arguments warranting additional discussion.

On rehearing, Brazos challenges our finding that there was an actual sale of the distilled water, the product produced by the facility's thermal output. Brazos argues that the third-party did not put the distilled water to a *bona fide* use. Our review of the record indicates that the City of Cleburne is in fact independent of Tenaska.[10] The Commission did not look into the economics of the sale of distilled water to the City of Cleburne.[11] We recognized that "there is no statutory requirement that the Commission find that the thermal output is being used in an economic manner" and that "there may be cases in which a particular facility, employing its thermal output for a common use, may not be economic." 83 FERC at 61,727. While we do not believe that a look at the economics of the sale is required for a common use of thermal output, we note that Tenaska alleged in its intervention in the revocation proceedings that the $10 a month price for its distilled water contained in its contract with the City of Cleburne "is one part of a multifaceted financial package that also involves tax abatements and other legitimate

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10. When the facility was certified the City of Cleburne was found to be a "third party." 70 FERC at 64,081.

11. The Commission only looks at the economic viability of the use of thermal output in very limited circumstances — when the thermal host is an affiliate of the cogenerator (or the cogenerator itself) and then only when the technology is previously unproven.

benefits for Tenaska."[12] In sum, we believe that a "sale" of the distilled water was made to a third-party purchaser, and that our decision not to look at the economics of that sale was correct.[13]

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12. Intervention at 14 n.19.

13. The Commission first found in *Kamine/Besicorp Allegany L.P.*, 63 FERC ¶ 61,320 (1993) (*Kamine*) that the distillation of water was presumptively useful because it was common (the finding that the use was common was based on the Commission's having been presented with four distilled water cogeneration facilities for certification in the past). The Commission followed *Kamine* in *Bayside Cogeneration, L.P.* 66 FERC ¶ 61,290, *reh'g denied*, 67 FERC ¶ 61,259 (1994); *Brooklyn Navy Yard Cogeneration Partners, L.P.*, 74 FERC ¶ 61,015 (1996); and *EcoEléctrica, L.P.*, 77 FERC 61,177, *reh'g denied*, 77 FERC ¶ 61,344 (1996).

In *Kamine* the Commission noted:

> The rebuttable presumption favored by San Diego also is inconsistent with the Congressional intent in enacting the Public Utility Regulatory Policies Act of 1978 (PURPA) to encourage the development of cogeneration facilities and other nontraditional power generation facilities. As the Supreme Court has explained, evidentiary, trial-type proceedings are disfavored under the statute: "Providing an opportunity for evidentiary hearings before the Commission . . . would seriously impede the very development of cogeneration and small power production the Congress sought to facilitate." *American Paper Institute, Inc., v. American Electric Power Service Corp.*, 461 U.S. 402, 420 (1983).

67 FERC at 62,006 n.5.

Appendix B

As to Brazos' contention that the City of Cleburne did not make a *bona fide* use of the distilled water, we continue to believe that the Commission was correct in not analyzing the third party's use of the product produced by the thermal output of the facility. As Brazos notes, the Commission is concerned that there will be a *bona fide* product produced by the thermal output of a facility.[14] However, "our commonality test was in essence designed to determine whether the proposed use of the facility and its thermal output is *bona fide*, or whether it is in essence a sham." *Kamine/ Besicorp Allegany L.P.*, 63 FERC ¶ 61,320 at p. 63,158 (1993). Thus our finding that the use of thermal output to produce distilled water is common assures that the use of the thermal output is *bona fide*.

Brazos further alleges that Commission precedent requires that the product produced by the thermal output be put to a *bona fide* use, citing *Brooklyn Navy Yard Cogeneration Partners, L.P.*, 74 FERC ¶ 61,015 at p. 61,046 n.9 (1996) (*Brooklyn Navy Yard*). However, the Commission has never found, in *Brooklyn Navy Yard* or elsewhere, that a QF's use of thermal output was "common" but not "useful." To the extent Brazos reads *dicta* in our precedent as allowing such a conclusion, we find no statutory requirement for such an analysis. Instead, the statute allows our inquiry to end when, as here, a QF's use is shown to be common.[15]

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14. Rehearing at 4.

15. We note that *Brooklyn Navy Yard* does not, as argued by Brazos, refer to the product being put to a *bona fide* use, but rather states that "the thermal output must be used in a *bona fide* manner

(Cont'd)

Appendix B

On rehearing, Brazos also alleges that Tenaska has not satisfied the ownership criteria for QF status. We addressed Brazos' arguments regarding ownership requirements for QF status, including its arguments regarding voting procedures and control in our May 18 order, 83 FERC at p. 61,726, and find that Brazos has raised nothing on rehearing on the ownership issue that warrants further discussion. However, Brazos on rehearing also faults the Commission for noting in our prior order that the ownership structure of Tenaska has not changed since the facility was granted QF status by the Commission.[16] Brazos was listed in the application and

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(Cont'd)
for a legitimate industrial, commercial, heating, or cooling purpose." The cases cited in the footnote in *Brooklyn Navy Yard* say the same thing, not that the product must be put to a *bona fide* use. This is consistent with our practice of not looking at how the product is being used. In *Brooklyn Navy Yard*, the utility-purchaser urged the Commission to find that the product produced by the thermal output, there distilled water, was not put to a common use. The utility-purchaser asked the Commission to find that using the distilled water to clean equipment at a waste water treatment plant was not a "useful" application of the product produced by the thermal output. The Commission declined to do so, saying that once it found that the thermal output was used to produce a common product, it would not look further to see how the common product was used. *See Brooklyn Navy Yard* at p. 61,046. Here, Tenaska produces distilled water using the thermal output of the facility. We see no difference between this situation and that in *Brooklyn Navy Yard*, and see no reason to look into the use of the product.

16. In the May 18 order, we noted the fact that ownership had not changed since the facility was certified. We also reaffirmed the holding on certification that Tenaska's facility satisfies the ownership requirements for QF status. 83 FERC at p. 61,728.

in the order certifying the facility as the utility-purchaser of the electric power output of the facility, but raised no objections to the ownership requirements (or for that matter any other requirement for QF status) at the time of certification. Under the circumstances, we do not believe that Brazos' challenge to the QF status of the facility based on ownership criteria is timely. Allowing such belated challenges to QF certifications despite unchanged facts would undermine the contractual reliance QFs need in order to finance and build their projects.[17]

In this regard we note that the order granting Tenaska QF status, like all certification orders, contains the following sentence:

> To the extent that facts or representations which form the basis for this order change, this order cannot be relied on.

70 FERC at p. 64,081. Conversely, to the extent that facts have not changed, QF certification orders can be relied on. *See Citizens for Clean Air and Reclaiming our Environment v. Newbay Corporation*, 56 FERC ¶ 61,426 (1991) and *Midland Cogeneration Venture Limited Partnership and CMS Midland, Inc.*, 56 FERC ¶ 61,361 (1991).

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17. *New York State Electric & Gas Corporation*, 71 FERC ¶ 61,027 at p. 61,117, *order denying reconsideration*, 72 FERC ¶ 61,067 (1995) (*NYSEG*), *appeal dismissed, New York State Electric & Gas Corporation v. FERC*, 117 F.3d 1473 (D.C. Cir. 1997).

Appendix B

Finally, Brazos argues that Tenaska is not entitled to a waiver of the Commission's operating standard. However, Tenaska has not sought, and we have not granted, such a waiver. We will address Brazos' arguments on this point if and when Tenaska files a request for such a waiver.

The Commission orders:

Rehearing is hereby denied.

By the Commission.

(SEAL)

David P. Boergers,
Secretary.

APPENDIX C — ORDER OF THE FEDERAL ENERGY REGULATORY COMMISSION OF THE UNITED STATES OF AMERICA DENYING MOTION AND PETITION TO REVOKE QUALIFYING STATUS DATED AND ISSUED MAY 18, 1998

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: James J. Hoecker, Chairman;
Vicky A. Bailey,
William L. Massey,
Linda Breathitt, and
Curt Hébert, Jr.

Docket Nos. EL97-56-000
and QF94-84-003

Brazos Electric Power Cooperative

v.

Tenaska IV Texas Partners, Ltd.

Order Denying Motion and Petition to
Revoke Qualifying Status
(Issued May 18, 1998)

On August 22, 1997, Brazos Electric Power Cooperative, Inc. (Brazos) filed a motion and petition to revoke the qualifying status of the qualifying facility (QF) owned by Tenaska IV Texas Partners, Ltd. (Tenaska). As discussed below, we will deny Brazos' request.

Appendix C

Background

Tenaska is the owner of a 284 MW cogeneration facility. The facility is located in Cleburne, Texas and consists of one combustion turbine generator, a separately-fired heat recovery boiler and an extraction/condensing turbine generator. The primary energy source is natural gas. The thermal output of the facility is used to produce distilled water which is sold to the City of Cleburne, Texas. The electric power produced by the facility is sold to Brazos.

The facility was initially self-certified. March 25, 1994, notice of self-certification in Docket No. QF94-84-000. A notice of self-recertification was filed on October 18, 1994, in Docket No. QF94-84-001. On October 20, 1994, Tenaska filed an application for certification as a qualifying topping-cycle cogeneration facility. The application for certification, which was not opposed, was granted. *Tenaska IV Texas Partners, Ltd.*, 70 FERC ¶ 62,026 (1995). In that order it was found that:

> Tenaska IV will use the thermal output of the facility to produce distilled water for sale to a third party. Tenaska's application of the thermal output for this purpose is common and, thus, is presumptively useful . . . .

70 FERC at 64,081.

Appendix C

In its petition seeking revocation of Tenaska's QF status,[1] Brazos alleges that:

> (1) The City of Cleburne pays only $10 a month for the distilled water from Tenaska's facility and has at times dumped the water down the sewer.[2] Brazos concludes that Tenaska's distillation of water has not proven to be "useful," thus rebutting the presumption of usefulness on which Tenaska's QF status was certified;
>
> (2) According to the application for certification, steam sent to the steam turbine fails to meet the sequentiality test of the Commission's regulations;[3] and
>
> (3) Tenaska does not satisfy the ownership requirements for QF status.

Brazos concludes that QF status is not warranted for Tenaska's facility.

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1. Brazos originally styled its revocation request as a motion to intervene in Tenaska's QF docket and to request revocation of Tenaska's QF status. The motion was submitted without a filing fee. A filing fee of $13,910 was requested by staff, which Brazos paid. On September 4, 1997, Brazos filed a motion requesting the Commission to rescind or waive the filing fee.

2. Brazos alleges that this case "may well be called the water-down-the-sewer" case. Brazos petition at 3.

3. 18 C.F.R. § 292.202(s) (1997).

Appendix C

Notice of Brazos' petition was published in the *Federal Register*, 62 *Fed. Reg.* 67,805 (1997), with comments, protests or motions to intervene due on or before October 3, 1997.

On October 3, 1997, Tenaska answered Brazos' petition. In its answer, Tenaska argues that the presumption of usefulness is not rebuttable, and that "usefulness" is also supported by the fact that the sale of the distilled water is to an unaffiliated third party. Tenaska further alleges that the ownership requirements for QF status have been satisfied. In the course of its pleading Tenaska noted that it "respectfully reserves its right to request a waiver of Section 210 of PURPA should the Commission ultimately decide" to revoke its QF status. Tenaska answer at 8 n.11. Tenaska also requests that the Commission "provide Tenaska any waivers the Commission may deem appropriate." Tenaska answer at 23.

On October 3, 1997, the PURPA Reform Group filed a motion to intervene in support of Brazos' request that Tenaska's QF status be revoked.[4] The PURPA Reform Group suggests that the revocation be permanent and that the Commission institute proceedings to determine an appropriate rate under Section 205 of the FPA for Tenaska's sales and a refund for past periods.

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4. The PURPA reform group is an association of investor-owned utilities that seeks prospective repeal of section 210 of PURPA, and pending repeal, the reform of federal and state administration of PURPA.

Appendix C

On October 20, 1997, Brazos filed a pleading which it states is an answer to Tenaska's motion for waiver and answer to the PURPA Reform Group's suggestion that the Commission institute proceedings to determine an appropriate refund. Brazos questions whether the Commission would have jurisdiction over the Tenaska sale in the absence of PURPA. Brazos also asks that the Commission sanction Tenaska's attorney for allegedly making misleading quotations of Commission precedent.

On October 20, 1997, Tenaska filed an answer in opposition to the PURPA Reform Group's intervention.

On November 4, 1997, Tenaska filed a motion to strike Brazos' October 20 pleading as an impermissible answer to an answer. Tenaska asserts that it has not formally requested a waiver of the Commission's QF regulations, and Brazos' October pleading is therefore an answer to its answer and thus not permitted by the Commission's Rules of Practice and Procedure. Tenaska attached to its motion an affidavit of the city manager of the City of Cleburne, attesting to the fact that the City of Cleburne began selling up to 100 percent of the distilled water produced by Tenaska's facility to an industrial user. The sale began on or about September 5, 1997, shortly after Brazos' revocation petition was filed, and about a year after the facility began producing electricity.

On November 12, 1997, Brazos filed an answer to Tenaska's motion to strike.

Appendix C

Discussion

Preliminary Matters

Under Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (1997), the timely, unopposed motion to intervene of Tenaska serves to make it a party to this proceeding. Notwithstanding Tenaska's opposition to the PURPA Reform Group's intervention, we find that good cause exists to grant its motion. We are satisfied that the PURPA Reform Group has expressed an interest in the outcome of this proceeding that is not represented by another party and that its participation may be in the public interest.

Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 285.214 (1997), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept the parties' various answers and responses. We find that, given the complex facts presented, these pleadings have aided us in understanding the various positions of the parities [sic]. Moreover, Brazos' October 20, 1997 pleading was properly responsive to Tenaska's request that the Commission grant any waivers necessary and to the PURPA Reform Group's request that we institute a rate proceeding.

We will deny Brazos' motion that we sanction Tenaska's attorney for misrepresenting Commission precedent. Our review of the precedent cited by Tenaska does not indicate that it has been misrepresented.

We will deny Brazos' motion that we rescind or waive the filing fee in this proceeding. In its request to revoke, Brazos requested that the Commission declare that Tenaska is not operating as certified in the Commission's order granting QF status, or as self-certified on two occasions by Tenaska. Brazos also requested that the Commission declare that Tenaska has never operated as a QF. All these requests were necessary for Brazos to receive what it wanted, a declaration that Tenaska does not have, and never had, QF status. Accordingly, staff properly requested that Brazos pay the customary fee for a declaratory order. Brazos further requests that we waive the fee if we find that fee was properly imposed. Brazos asserts that it is a generation and transmission rural electric cooperative which does not make a profit, but operates solely for the benefits of its customers. It states that payment of the $13,910 fee is a significant expense to itself and to its members. The Commission's regulations provide for waiver of filing fees when the applicant is suffering from severe economic hardship at the time of filing which makes the applicant economically unable to pay the appropriate fee. 18 C.F.R. § 381.106 (1997). Brazos makes no claim of such economic hardship. We therefore will deny waiver of the filing fee.

Tenaska's QF Status

Use of Thermal Output

Brazos' request that we revoke Tenaska's QF status is based primarily on the allegation that Tenaska's production of distilled water for sale to the unaffiliated City of Cleburne, Texas, is not "useful." As noted above, the Commission in

certifying Tenaska's facility as a QF found that the use of thermal output to produce distilled water was "presumptively useful." Brazos claims that the presumption has been rebutted by actual operation of the facility. Brazos claims that Tenaska's financial arrangements with the City of Cleburne, as well as the fact that the City allegedly has at times dumped the distilled water into its sewer, prove that the use of Tenaska's thermal output has not in fact been useful for purposes of QF status.

By statute, a cogeneration facility is defined as a facility which produces electric energy and "steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating, or cooling purposes." Section 3(18)(A) of the FPA. The Commission tracked this language in its regulations, where it stated that a cogeneration facility means:

> equipment used to produce electric energy and forms of useful thermal energy (such as heat or steam), used for industrial, commercial, heating, or cooling purposes, through the sequential use of energy.

18 C.F.R. § 292.202(c) (1997). The Commission subsequently through case law described how it would determine whether a particular facility produces useful thermal energy for purposes of QF status. If the use of a cogeneration facility's thermal output constitutes a common industrial or commercial application, it is presumptively useful and the Commission performs no further analysis regarding the usefulness of the thermal output. On the other hand, in those rare cases in which the use involves a

technology which is not common, separate standards apply depending upon whether the user is an affiliate of the cogenerator, is the cogenerator itself, or is an unaffiliated entity. In the case of a thermal host that is not affiliated with the cogenerator, plausible evidence of either an arm's-length market for the thermal output or an end product produced with the aid of the thermal output establishes usefulness. *Kamine/Besicorp Allegany L.P.*, 63 FERC ¶ 61,320, at pp. 63,157-58 (1993); *Polk Power Partners, L.P.*, 61 FERC ¶ 61,300, *appeal dismissed sub nom. Liquid Carbonic Industries Corporation v. FERC*, 29 F.3d 697 (D.C. Cir 1994); and *Arroyo Energy, Limited Partnership*, 62 FERC ¶ 61,257, *reh'g denied*, 63 FERC ¶ 61,198 (1993). There is no statutory requirement that the Commission find that the thermal output is being used in an economic manner.[5] Indeed, the Commission looks at the economic viability of the use of thermal output to assess whether the energy is "useful" only in very limited circumstances — only when the thermal host is an affiliate of the cogenerator (or the cogenerator itself), and then only when the technology is previously unproven.

Brazos' request that we revoke Tenaska's QF status shows a profound misunderstanding about what the Commission means by "presumptively useful." Brazos would have us view this "presumption" as an evidentiary presumption which is rebuttable. But this has never been the Commission's intention or practice. The Commission,

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5. Nor is there anything in PURPA or in the Commission's regulations or precedent which makes the usefulness of thermal output dependent upon the price at which it, or its end product, is ultimately sold. *Polk Power Partners*, 61 FERC at p. 62,128.

upon finding that the usefulness of a thermal application has been established by common practice, is making a finding that a particular use of cogenerated thermal energy is economic and it thus "presumes" that the thermal output is useful. Indeed, the Commission has stated that a more accurate way to describe its process is that it "assumes" that energy is useful within the meaning of the statute when it is used in a common process or used to produce a common product. *Bayside Cogeneration, L.P.*, 67 FERC ¶ 61,290 at p. 62,006 & n.4 (1994).

The Commission recognizes that there may be cases in which a particular facility, employing its thermal output for a common use, may not be economic. Likewise, in cases in which the theoretical economic viability of a facility employing a new technology is established by evidence in a proceeding (the independent business purpose test), it does not necessarily mean that the facility will make money on the thermal use, but means merely that the facility is in theory capable of making money using the technology. *Id.*

Moreover, the Commission, once satisfied that the proposed use of cogenerated thermal output in a particular manner is common, will not inquire further into how the product produced by the thermal output is being used, *e.g.*, into the economics of the application. *Brooklyn Navy Yard Cogeneration Partners, L.P.*, 74 FERC ¶ 61,015 (1996).

Here, Tenaska produces a product, distilled water, which has been found to be presumptively useful. The Commission will not look into the economics of its sale of the product, or into how the product is being used by the unaffiliated purchaser of the product.

Appendix C

Sequentiality

Brazos alleges that, according to the application for certification, as the facility is configured, steam sent to the steam turbine is not used at all times in a sequential manner to produce power and then used to distill water. Brazos alleges that such steam is not used for the thermal process unless there is insufficient steam available directly from the boiler to the distillation process. In essence the allegation is that Tenaska is not continually using extraction steam from the steam turbine to distill water. Section 292.202(c) of our regulations, 18 C.F.R. § 292.202(c) (1997), defines a cogeneration facility as equipment which produces both electric energy and forms of useful thermal energy, through a sequential use of energy. Section 292.202(s)(1) defines sequentiality for a topping-cycle cogeneration facility, as the use of reject heat from a power production process in sufficient amounts in a thermal application or process to conform to the requirements of the operating standard. 18 C.F.R. § 292.202(s) (1997). Our analysis of the use of the steam indicates that the Tenaska facility produces both electric energy and useful thermal output through the sequential use of steam. In *George W. Yeagle*, 25 FERC ¶ 61,226 (1983), the Commission stated that it is not necessary to meet the sequential test continuously during the year as long as the minimum operating and efficiency standards are met on a calendar year basis.[6]

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6. Brazos also alleges that some of the distilled water sold to the City of Cleburne is indirectly returned to the facility to be used in the power production cycle and should therefore not be credited to the thermal process in the calculation of the operating value. (Cont'd)

Moreover, Brazos did not challenge the design of the facility during the certification process. There is no indication that the design of the facility has changed since the Commission certified the facility as a QF.

Ownership

In its revocation petition, Brazos also alleges that Tenaska does not satisfy the ownership requirements for QF status. Brazos petition at 24. Brazos agrees with the finding in our certification order that affiliates of three electric utilities own a 45 percent interest in the facility, less than the 50 percent maximum specified in our regulations.[7] However, Brazos alleges that because a 70 percent vote is needed to take significant actions, the utility affiliates' 45 percent interest may give the utility affiliates effective control over the operation of the facility. Brazos ignores the fact that unless the non-utility owners supply an additional 25 percent of the total votes, no significant action can be taken on the facility's day-to-day operation. Moreover, Tenaska's

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(Cont'd)
Brazos claims that deducting the thermal energy associated with the allegedly returned water would cause the facility's operating value of 5.1 percent to drop below the 5 percent minimum requirement. Production of water by the facility which is sold to an entity unaffiliated with the cogeneration facility is independent of the power production cycle. *See*, EcoEléctrica, L.P., 77 FERC ¶ 61,117 at p. 61,452 n.7 (1996), *reh'g denied*, 77 FERC ¶ 61,344 at p. 62,511 & n.6 (1996). Moreover, Brazos has presented no evidence in support of its allegation.

7. 18 C.F.R. § 292.206 (1997).

ownership has not changed since the Commission certified the facility as a QF. The application was noticed for comment at that time, and Brazos failed to raise the ownership interest issue. The Commission, in its order certifying the facility, specifically addressed the issue of the voting rights and utility control and found that utility control was not present. 70 FERC at p. 64,080.

In conclusion, we will deny Brazos' request that we declare that Tenaska is not a QF.

The Commission orders:

(A) The PURPA Reform Group's motion to intervene is hereby granted.

(B) Brazos' petition and motion for revocation is hereby denied.

By the Commission.

(SEAL)

David P. Boergers,
Acting Secretary.

APPENDIX D — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED APRIL 28, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-60568

BRAZOS ELECTRIC POWER COOPERATIVE INCORPORATED

Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION;

Respondent

Petitions for Review of an Order of the
Federal Energy Regulatory Comission

ON PETITION FOR REHEARING AND
REHEARING EN BANC
(Opinion 2/29/00, 5 Cir., __, __ F.3d __)

Before KING, Chief Judge, and REYNALDO G. GARZA and EMILIO M. GARZA, Circuit Judges.

Appendix D

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

* * *

ENTERED FOR THE COURT:

s/ Carolyn Dineen King
CHIEF JUDGE

Judge Jolly did not participate in the consideration of the rehearing en banc.

APPENDIX E — RELEVANT STATUTES AND REGULATIONS

ADMINISTRATIVE PROCEDURE ACT SECTION 10(e), 5 U.S.C. § 706

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be —

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

FEDERAL POWER ACT SECTION 3, 16 U.S.C. § 796

Definitions

The words defined in this section shall have the following meanings for purposes of this chapter, to wit:

. . . .

(17)(A) "small power production facility" means a facility which is an eligible solar, wind, waste, or geothermal facility, or a facility which —

(i) produces electric energy solely by the use, as a primary energy source, of biomass, waste, renewable resources, geothermal

resources, or any combination thereof; and

(ii) has a power production capacity which, together with any other facilities located at the same site (as determined by the Commission), is not greater than 80 megawatts;

(B) "primary energy source" means the fuel or fuels used for the generation of electric energy, except that such term does not include, as determined under rules prescribed by the Commission, in consultation with the Secretary of Energy —

(i) the minimum amounts of fuel required for ignition, startup, testing, flame stabilization, and control uses, and

(ii) the minimum amounts of fuel required to alleviate or prevent —

(I) unanticipated equipment outages, and

(II) emergencies, directly affecting the public health, safety, or welfare, which would result from electric power outages;

Appendix E

(C) "qualifying small power production facility" means a small power production facility —

(i) which the Commission determines, by rule, meets such requirements (including requirements respecting fuel use, fuel efficiency, and reliability) as the Commission may, by rule, prescribe; and

(ii) which is owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities);

(D) "qualifying small power producer" means the owner or operator of a qualifying small power production facility;

(18)(A) "cogeneration facility" means a facility which produces —

(i) electric energy, and

(ii) steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating, or cooling purposes;

(B) "qualifying cogeneration facility" means a cogeneration facility which —

(i) the Commission determines, by rule, meets such requirements (including requirements respecting minimum size, fuel use, and fuel efficiency) as the Commission may, by rule, prescribe; and

(ii) is owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities);

(C) "qualifying cogenerator" means the owner or operator of a qualifying cogeneration facility;

. . . .

FEDERAL POWER ACT SECTION 313, 16 U.S.C. § 825*l*

Review of orders

(a) Application for rehearing; time periods; modification of order

Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a

proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A

copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(c) Stay of Commission's order

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

PURPA SECTION 2, 16 U.S.C. § 2601

Findings

The Congress finds that the protection of the public health, safety, and welfare, the preservation of national security, and the proper exercise of congressional authority under the Constitution to regulate interstate commerce require —

> (1) a program providing for increased conservation of electric energy, increased efficiency in the use of facilities and resources by electric utilities, and equitable retail rates for electric consumers,
>
> (2) a program to improve the wholesale distribution of electric energy, the reliability of electric service, the procedures concerning consideration of wholesale rate applications before the Federal Energy Regulatory Commission, the participation of the public in matters before the Commission, and to provide other measures with respect to the regulation of the wholesale sale of electric energy,

(3) a program to provide for the expeditious development of hydroelectric potential at existing small dams to provide needed hydroelectric power,

(4) a program for the conservation of natural gas while insuring that rates to natural gas consumers are equitable,

(5) a program to encourage the development of crude oil transportation systems, and

(6) the establishment of certain other authorities as provided in title VI of this Act.

PURPA SECTION 210(a)-(e), (*l*),
16 U.S.C. § 824a-3

Cogeneration and small power production

(a) Cogeneration and small power production rules

Not later than 1 year after November 9, 1978, the Commission shall prescribe, and from time to time thereafter revise, such rules as it determines necessary to encourage cogeneration and small power production, and to encourage geothermal small power production facilities of not more than 80 megawatts capacity, which rules require electric utilities to offer to —

(1) sell electric energy to qualifying cogeneration facilities and qualifying small power production facilities and

(2) purchase electric energy from such facilities.

Such rules shall be prescribed, after consultation with representatives of Federal and State regulatory agencies having ratemaking authority for electric utilities, and after public notice and a reasonable opportunity for interested persons (including State and Federal agencies) to submit oral as well as written data, views, and arguments. Such rules shall include provisions respecting minimum reliability of qualifying cogeneration facilities and qualifying small power production facilities (including reliability of such facilities during emergencies) and rules respecting reliability of electric energy service to be available to such facilities from electric utilities during emergencies. Such rules may not authorize a qualifying cogeneration facility or qualifying small power production facility to make any sale for purposes other than resale.

(b) Rates for purchases by electric utilities

The rules prescribed under subsection (a) of this section shall insure that, in requiring any electric utility to offer to purchase electric energy from any qualifying cogeneration facility or qualifying small power production facility, the rates for such purchase—

(1) shall be just and reasonable to the electric consumers of the electric utility and in the public interest, and

(2) shall not discriminate against qualifying cogenerators or qualifying small power producers.

No such rule prescribed under subsection (a) of this section shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy.

(c) Rates for sales by utilities

The rules prescribed under subsection (a) of this section shall insure that, in requiring any electric utility to offer to sell electric energy to any qualifying cogeneration facility or qualifying small power production facility, the rates for such sale —

(1) shall be just and reasonable and in the public interest, and

(2) shall not discriminate against the qualifying cogenerators or qualifying small power producers.

(d) "Incremental cost of alternative electric energy" defined

For purposes of this section, the term "incremental cost of alternative electric energy" means, with respect to electric energy purchased from a qualifying cogenerator or qualifying small power producer, the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source.

Appendix E

(e) Exemptions

(1) Not later than 1 year after November 9, 1978, and from time to time thereafter, the Commission shall, after consultation with representatives of State regulatory authorities, electric utilities, owners of cogeneration facilities and owners of small power production facilities, and after public notice and a reasonable opportunity for interested persons (including State and Federal agencies) to submit oral as well as written data, views, and arguments, prescribe rules under which geothermal small power production facilities of not more than 80 megawatts capacity, qualifying cogeneration facilities, and qualifying small power production facilities are exempted in whole or part from the Federal Power Act (16 U.S.C. § 791a et seq.), from the Public Utility Holding Company Act (15 U.S.C. § 79 et seq.), from State laws and regulations respecting the rates, or respecting the financial or organizational regulation, of electric utilities, or from any combination of the foregoing, if the Commission determines such exemption is necessary to encourage cogeneration and small power production.

(2) No qualifying small power production facility (other than a qualifying small power production facility which is an eligible solar, wind, waste, or geothermal facility as defined in section 796(17)(E) of this title) which has a power

production capacity which, together with any other facilities located at the same site (as determined by the Commission), exceeds 30 megawatts, or 80 megawatts for a qualifying small power production facility using geothermal energy as the primary energy source, may be exempted under rules under paragraph (1) from any provision of law or regulation referred to in paragraph (1), except that any qualifying small power production facility which produces electric energy solely by the use of biomass as a primary energy source, may be exempted by the Commission under such rules from the Public Utility Holding Company Act (15 U.S.C. § 79 et seq.) and from State laws and regulations referred to in such paragraph (1).

(3) No qualifying small power production facility or qualifying cogeneration facility may be exempted under this subsection from —

(A) any State law or regulation in effect in a State pursuant to subsection (f) of this section,

(B) the provisions of section 210, 211, or 212 of the Federal Power Act [16 U.S.C. § 824i, 824j, or 824k] or the necessary authorities for enforcement of any such provision under the Federal Power Act (16 U.S.C. § 791a et seq.), or

(C) any license or permit requirement under part I of the Federal Power Act (16 U.S.C. § 791a et seq.), any provision under such Act related to such a license or permit requirement, or the necessary authorities for enforcement of any such requirement.

. . .

(*l*) Definitions

For purposes of this section, the terms "small power production facility", "qualifying small power production facility", "qualifying small power producer", "primary energy source", "cogeneration facility", "qualifying cogeneration facility", and "qualifying cogenerator" have the respective meanings provided for such terms under section 3(17) and (18) of the Federal Power Act (16 U.S.C. § 796(17), (18)).

18 C.F.R. § 292.201 (1999)

Sec. 292.201 Scope. This subpart applies to the criteria for and manner of becoming a qualifying small power production facility and a qualifying cogeneration facility under sections 3(17)(C) and 3(18)(B), respectively, of the Federal Power Act, as amended by section 201 of the Public Utility Regulatory Policies Act of 1978 (PURPA).

Appendix E

18 C.F.R. § 292.202 (1999)

Sec. 292.202 Definitions. For purposes of this subpart:

. . . .

(c) *Cogeneration facility* means equipment used to produce electric energy and forms of useful thermal energy (such as heat or steam), used for industrial, commercial, heating, or cooling purposes, through the sequential use of energy;

(d) *Topping-cycle cogeneration facility* means a cogeneration facility in which the energy input to the facility is first used to produce useful power output, and at least some of the reject heat from the power production process is then used to provide useful thermal energy;

(e) *Bottoming-cycle cogeneration facility* means a cogeneration facility in which the energy input to the system is first applied to a useful thermal energy application or process, and at least some of the reject heat emerging from the application or process is then used for power production;

(f) *Supplementary firing* means an energy input to the cogeneration facility used only in the thermal process of a topping-cycle cogeneration facility, or only in the electric generating process of a bottoming-cycle cogeneration facility;

(g) *Useful power output* of a cogeneration facility means the electric or mechanical energy made available for use, exclusive of any such energy used in the power production process;

(h) *Useful thermal energy output* of a topping-cycle cogeneration facility means the thermal energy: (1) That is made available to an industrial or commercial process (net of any heat contained in condensate return and/or makeup water); (2) That is used in a heating application (e.g., space heating, domestic hot water heating); or (3) That is used in a space cooling application (i.e., thermal energy used by an absorption chiller).

(i) *Total energy output* of a topping-cycle cogeneration facility is the sum of the useful power output and useful thermal energy output;

(j) *Total energy input* means the total energy of all forms supplied from external sources;

(k) *Natural gas* means either natural gas unmixed, or any mixture of natural gas and artificial gas;

(l) *Oil* means crude oil, residual fuel oil, natural gas liquids, or any refined petroleum products; and

(m) Energy input in the case of energy in the form of natural gas or oil is to be measured by the lower heating value of the natural gas or oil.

(n) *Electric utility holding company* means a holding company, as defined in section 2(a)(7) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79b(a)(7) which owns one or more electric utilities, as defined in section 2(a)(3) of that Act, 15 U.S.C 79b(a)(3), but does not include any holding company which is exempt by rule or order

adopted or issued pursuant to sections 3(a)(3) or 3(a)(5) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79c(a)(3) or 79c(a)(5).

. . . .

(s) *Sequential use* of energy means: (1) For a topping-cycle cogeneration facility, the use of reject heat from a power production process in sufficient amounts in a thermal application or process to conform to the requirements of the operating standard; or (2) For a bottoming-cycle cogeneration facility, the use of reject heat from a thermal application or process, at least some of which is then used for power production.

18 C.F.R. § 292.203 (1999)

Sec. 292.203 General requirements for qualification.

(a) *Small power production facilities.* Except as provided in paragraph (c) of this section, a small power production facility is a qualifying facility if it: (1) Meets the maximum size criteria specified in Sec. 292.204(a); (2) Meets the fuel use criteria specified in Sec. 292.204(b); and (3) Meets the ownership criteria specified in Sec. 292.206.

(b) *Cogeneration facilities.* A cogeneration facility, including any diesel and dual-fuel cogeneration facility, is a qualifying facility if it: (1) Meets any applicable operating and efficiency standards specified in Sec. 292.205 (a) and (b); and (2) Meets the ownership criteria specified in Sec. 292.206.

. . . .

Appendix E

18 C.F.R. § 292.205 (1999)

Sec. 292.205 Criteria for qualifying cogeneration facilities.

(a) *Operating and efficiency standards for topping-cycle facilities —*

(1) *Operating standard.* For any topping-cycle cogeneration facility, the useful thermal energy output of the facility must be no less than 5 percent of the total energy output during the 12-month period beginning with the date the facility first produces electric energy, and any calendar year subsequent to the year in which the facility first produces electric energy.

(2) *Efficiency standard.* (i) For any topping-cycle cogeneration facility for which any of the energy input is natural gas or oil, and the installation of which began on or after March 13, 1980, the useful power output of the facility plus one-half the useful thermal energy output, during the 12-month period beginning with the date the facility first produces electric energy, and any calendar year subsequent to the year in which the facility first produces electric energy, must: (A) Subject to paragraph (a)(2)(i)(B) of this section be no less than 42.5 percent of the total energy input of natural gas and oil to the facility; or (B) If the useful thermal energy output is less than 15 percent of the total energy output of the facility, be no less than 45 percent of the total energy input

of natural gas and oil to the facility. (ii) For any topping-cycle cogeneration facility not subject to paragraph (a)(2)(i) of this section there is no efficiency standard.

(b) *Efficiency standards for bottoming-cycle facilities.* (1) For any bottoming-cycle cogeneration facility for which any of the energy input as supplementary firing is natural gas or oil, and the installation of which began on or after March 13, 1980, the useful power output of the facility during the 12-month period beginning with the date the facility first produces electric energy, and any calendar year subsequent to the year in which the facility first produces electric energy must be no less than 45 percent of the energy input of natural gas and oil for supplementary firing. (2) For any bottoming-cycle cogeneration facility not covered by paragraph (b)(1) of this section, there is no efficiency standard.

(c) *Waiver.* The Commission may waive any of the requirements of paragraphs (a) and (b) of this section upon a showing that the facility will produce significant energy savings.

18 C.F.R. § 292.206 (1999)

Sec. 292.206 Ownership criteria.

(a) *General rule.* A cogeneration facility or small power production facility may not be owned by a person primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities).

(b) *Ownership test.* For purposes of this section, a cogeneration or small power production facility shall be considered to be owned by a person primarily engaged in the generation or sale of electric power, if more than 50 percent of the equity interest in the facility is held by an electric utility or utilities, or by an electric utility holding company, or companies, or any combination thereof. If a wholly or partially owned subsidiary of an electric utility or electric utility holding company has an ownership interest of a facility, the subsidiary's ownership interest shall be considered as ownership by an electric utility or electric utility holding company.

(c) *Exceptions.* For purposes of this section a company shall not be considered to be an "electric utility" company if it: (1) Is a subsidiary of an electric utility holding company which is exempt by rule or order adopted or issued pursuant to section 3(a)(3) or 3(a)(5) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79c(a)(3), 79c(a)(5); or (2) Is declared not to be an electric utility company by rule or order of the Securities and Exchange Commission pursuant to section 2(a)(3)(A) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79b(a)(3)(A).

18 C.F.R. § 292.207 (1999)

Sec. 292.207 Procedures for obtaining qualifying status.

(a) *Self-certification and pre-authorized Commission recertification* —

(1) *Self-certification.* (i) A small power production facility or cogeneration facility that

meets the applicable criteria established in Sec. 292.203 is a qualifying facility. (ii) The owner or operator of a facility or its representative self-certifying under this section must file with the Commission, and concurrently serve on each electric utility with which it expects to interconnect, transmit or sell electric energy to or purchase supplementary, standby, back-up and maintenance power, and the State regulatory authority of each state where the facility and each affected utility is located, a notice of self-certification which contains a completed Form 556. (iii) Subsequent notices of self-recertification for the same facility may reference prior notices or prior Commission certifications, and need only refer to changes which have occurred with respect to the facility since the prior notice or the prior Commission certification. (iv) Notices of self-certification or self-recertification will not be published in the FEDERAL REGISTER.

(2) *Pre-authorized Commission recertification.* (i) For purposes of paragraph (b) of this section, the following alterations or modifications are not considered substantial alterations or modifications and will not result in revocation of qualifying status previously granted by the Commission pursuant to paragraph (b) of this section: (A) A change which does not affect the upstream ownership of the facility; (B) A change in the installation or operation date; (C) A change in the manufacturer of the power generation equipment

selected for the facility's installation when there is no change in capacity or operating characteristics; (D) A change in the location of a cogeneration facility, or a small power production facility, if the new location would not cause the facility to violate the 80 MW limitation of Sec. 292.204(a)(1); (E) A decrease in the amount of natural gas or oil or any change in the amount of other fuel used by a cogeneration facility, provided that the efficiency value and the operating value calculation for the facility remain at or above the values stated when the certification or recertification order was issued; (F) A decrease in the amount of fossil fuel used by a small power production facility; (G) A change in the primary energy source of a small power production facility, provided that the facility continues to comply with the requirements of Sec. 292.204; (H) An additional use of a cogeneration facility's thermal output, if the original uses are as stated when the certification order was issued; (I) An increase in the efficiency value of a cogeneration facility or an increase in the operating value of a cogeneration facility determined in accordance with Sec. 292.205; (J) A decrease in the power production capacity of a small power production facility; (K) A change in the power production capacity of a cogeneration facility if the efficiency value and the operating value calculation for the facility remain at or above the values stated when the certification or recertification order was issued; or (L) A change in the purchaser of the

cogeneration facility's thermal output, when there is no change in the specified thermal application or process. (ii) The owner or operator of a qualifying facility that has been certified under paragraph (b) of this section must file with the Commission notice of each change listed in this subsection, and must concurrently serve a copy of such notice on each electric utility with which it expects to interconnect, transmit or sell electric energy to, or purchase supplementary, standby, back-up and maintenance power, and the State regulatory authority of each state where the facility and each affected electric utility is located.

(b) *Optional procedure* —

(1) *Application for Commission certification.* In lieu of the certification procedures in paragraph (a) of this section, an owner or operator of a facility or its representative may file with the Commission an application for Commission certification that the facility is a qualifying facility. The application must be accompanied by the fee prescribed by part 381 of this chapter.

(2) *General contents of application.* The application must include a completed Form 556.

(3) *Commission action.* (i) Within 90 days of the later of the filing of an application or the filing of a supplement, amendment or other change to the application, the Commission will either: inform

the applicant that the application is deficient; or issue an order granting or denying the application; or toll the time for issuance of an order. Any order denying certification shall identify the specific requirements which were not met. If the Commission does not act within 90 days of the date of the latest filing, the application shall be deemed to have been granted. (ii) For purposes of paragraph (b) of this section, the date an application is filed is the date by which the Office of the Secretary has received all of the information and the appropriate filing fee necessary to comply with the requirements of this Part.

(4) *Notice.* (i) Applications for certification filed under paragraph (b) of this section must include a form of notice of the request for certification suitable for publication in the FEDERAL REGISTER, as well as a copy of the same notice in electronic format (in either ASCII text, WordPerfect 5.1 for DOS or WordPerfect 5.2 for Windows format) on a 3½" diskette marked with the name of the applicant and the words "Notice of Filing." The notice must state the applicant's name, the date of the application, a description of the facility for which qualification is sought and, if known, the names of the electric utilities to which the facility expects to interconnect, transmit or sell electric energy, or from which the facility expects to purchase supplementary, standby, back-up and maintenance power. This description must include: (A) A statement indicating whether such

facility is a small power production facility or a cogeneration facility; (B) The primary energy source used or to be used by the facility; (C) The power production equipment and capacity of the facility; and (D) The location of the facility. (ii) The notice must be in the following form:

(Name of Applicant)

Docket No. QF-

NOTICE OF APPLICATION FOR COMMISSION CERTIFICATION OF QUALIFYING STATUS OF A (SMALL POWER PRODUCTION) (COGENERATION) FACILITY

On (date application was filed), (name and address of applicant) filed with the Federal Energy Regulatory Commission an application for certification (or recertification) of a facility as a qualifying (small power production) (cogeneration) facility pursuant to Sec. 292.207(b) of the Commission's regulations. No determination has been made that the submittal constitutes a complete filing.

[Description of facility.]

[Names of the electric utilities with which the facility expects to interconnect, transmit or sell electric energy to, or purchase supplementary, standby, back-up and maintenance power (if known).]

Appendix E

Any person who wishes to be heard or to object to granting qualifying status should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with rules 211 and 214 of the Commission's Rules of Practice and Procedure. A motion or protest must be filed within _____ days after the date of publication of this notice and must be served on the applicant. Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. A person who wishes to become a party must file a motion to intervene. Copies of this application are on file with the Commission and are available for public inspection.

(c) *Notice requirements for facilities of 500 kW or more.* An electric utility is not required to purchase electric energy from a facility with a design capacity of 500 kW or more until 90 days after the facility notifies the utility that it is a qualifying facility, or 90 days after the facility has applied to the Commission under paragraph (b) of this section.

(d) *Revocation of qualifying status.*

(1)(i) If a qualifying facility fails to conform with any material facts or representations presented by the cogenerator or small power producer in its submittals to the Commission, the notice of self-certification of the qualifying status of the facility,

pre-authorized Commission re-certification notice, or Commission order certifying the qualifying status of the facility may no longer be relied upon. At that point, if the facility continues to conform to the Commission's qualifying criteria under this part, the cogenerator or small power producer may file either a notice of self-recertification of qualifying status pursuant to the requirements of paragraph (a)(1) of this section, a pre-authorized Commission recertification notice pursuant to the requirements of paragraph (a)(2) of this section, or an application for Commission recertification pursuant to the requirements of paragraph (b) of this section, as appropriate. (ii) The Commission may, on its own motion or on the motion of any person, revoke the qualifying status of a facility that has been certified under paragraph (b) of this section, if the facility fails to conform to any of the Commission's qualifying facility criteria under this part. (iii) The Commission may revoke the qualifying status of a self-certified qualifying facility upon the filing of a petition for a declaratory order that the self-certified qualifying facility does not meet applicable requirements for qualifying facilities.

(2) Prior to undertaking any substantial alteration or modification of a qualifying facility which has been certified under paragraph (b) of this section, a small power producer or cogenerator may apply to the Commission for a determination that the

proposed alteration or modification will not result in a revocation of qualifying status. This application for Commission recertification of qualifying status should be submitted in accordance with paragraph (b) of this section.

18 C.F.R. § 385.217 (1999)

Sec. 385.217 Summary disposition (Rule 217).

(a) *Applicability.* This section applies to: (1) Any proceeding, or any part of a proceeding, while the Commission is the decisional authority; and (2) Any proceeding, or part of a proceeding, which is set for hearing under subpart E.

(b) *General rule.* If the decisional authority determines that there is no genuine issue of fact material to the decision of a proceeding or part of a proceeding, the decisional authority may summarily dispose of all or part of the proceeding.

(c) *Procedures.* (1) Any participant may make a motion for summary disposition of all or part of a proceeding. (2) If a decisional authority, other than the Commission, is considering summary disposition of a proceeding, or part of a proceeding, in the absence of a motion for summary disposition by a participant, the decisional authority will grant the participants an opportunity to comment on the proposed disposition prior to any summary disposition, unless, for good cause shown, the decisional authority provides otherwise. (3) If, prior to setting a matter for hearing, the Commission is considering summary disposition

of a proceeding or part of a proceeding in the absence of a motion for summary disposition by any participant and the Commission determines that notice and comment on summary disposition are practicable and necessary, the Commission may notify the participants and afford them an opportunity to comment on any proposed summary disposition.

(d) *Disposition.* (1)(i) If a decisional authority, other than the Commission, summarily disposes of an entire proceeding, the decisional authority will issue an initial decision for the entire proceeding. (ii) Except as provided under paragraph (d)(1)(iii) of this section, a decisional authority, other than the Commission, which summarily disposes of part of a proceeding may: (A) Issue a partial initial decision; or (B) Postpone issuing an initial decision on the summarily disposed part and combine it with the initial decision on the entire proceeding or other appropriate part of the proceeding. (iii) If the decisional authority, other than the Commission, summarily disposes of part of a proceeding and such disposition requires the filing of new tariff or rate schedule sheets, the decisional authority will issue an initial decision on that part of the proceeding. (2) Any initial decision issued under paragraph (d)(1) of this section is considered an initial decision issued under subpart G of this part, except that the following rules do not apply: Rule 704 (rights of participants before initial decision), Rule 705 (discretion of presiding officer before initial decision), Rule 706 (initial and reply briefs before initial decision), Rule 707 (oral argument before initial decision), and Rule 709 (other types of decisions).

* * * *

Supreme Court, U.S.
FILED
SEP 28 2000
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No. 00-160

IN THE

Supreme Court of the United States

BRAZOS ELECTRIC POWER COOPERATIVE, INC.,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION and
TENASKA IV TEXAS PARTNERS, LTD.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF RESPONDENT TENASKA IV TEXAS PARTNERS, LTD. IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission ("FERC") reasonably interpreted the statutory requirement that a qualifying cogeneration facility ("QF") produces "useful energy," 16 U.S.C. § 796 (18)(A)(ii), when it determined that distilled water produced by a QF in a common commercial process for sale to a third party is presumptively useful, without thereafter considering in response to a petition to revoke a previously granted QF certification either the economics of such sales or the downstream uses of the distilled water?

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COUNTERSTATEMENT OF THE CASE

A. The Parties and Their Positions

In the early 1990s, Petitioner Brazos Electric Power Cooperative, Inc. ("Brazos"), which generates electricity for its member cooperatives, determined that it would face a shortage of generating capacity beginning in 1997. R. 463. Brazos considered several different options for obtaining sufficient supplies of electricity to meet this shortage. Brazos considered building and owning additional generating facilities; buying electricity from utilities in Texas at tariff rates approved by the Public Utilities Commission of Texas ("PUCT"); buying electricity from outside of Texas; and a proposal by Respondent Tenaska IV Texas Partners, Ltd. ("Tenaska")[1] under which Tenaska would build and own a generating facility and sell its electric output to Brazos. R. 419, 463, *infra* at 6. Brazos accepted Tenaska's proposal because it met Brazos's needs at the lowest cost. R. 463, 465, 477-78, *infra* at 6-7. Brazos and Tenaska then negotiated a long-term power purchase agreement.

At that time, it was important to both Tenaska and Brazos that the generating facility be certified as a "qualifying cogeneration facility" or "QF" under Section 3(18) of the Public Utility Regulatory Policies Act ("PURPA"), 16 U.S.C. § 796(18) (1994). This was important to Tenaska because, at that time in Texas, only QFs could be built as non-utility generating plants. R. 463, 471. Also, as the owner of a QF,

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[1] Tenaska is a privately-held limited partnership that is wholly owned by Ponderosa Pine Energy, LLC, and ECT Merchant Investments Corp. The latter is an affiliate of Enron Corp., whose stock is publicly traded on the New York Stock Exchange.

Tenaska would not be subject to many of the provisions of the Federal Power Act, the Public Utility Holding Company of 1935 or state utility regulation. 16 U.S.C. § 824a-3(e) (1994); 18 C.F.R. §§ 292.601(c) and 292.602(c)(i) (1998).

Establishing the generating plant as a QF also was important to Brazos because certification of the power purchase agreement by the PUCT was available only if the agreement was with a QF. Certification by the PUCT assured Brazos of recovery of its purchased power costs. R. 91. Establishing the generating plant as a QF also would permit Tenaska to require Brazos to interconnect with the plant and to purchase its output at Brazos's fully avoided costs.[2] 18 C.F.R. §§ 292.303(a) and 304(a)(2) (1998); *see generally, American Paper Inst. v. American Elec. Power Serv. Corp.*, 461 U.S. 402 (1983).

To be a QF Tenaska's generating plant had to produce electric power and "steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating, or cooling purposes." 16 U.S.C. § 796(18). FERC has consistently interpreted 16 U.S.C. § 796(18) to mean that the usefulness of the energy would be conclusively established if the energy is used in a common process. *Electrodyne Research Corp.*, 32 F.E.R.C. ¶ 61,102 (1985). In 1993, FERC had determined that the production of heat for the purpose of distilling water was a common process. *Kamine/Besicorp Allegany L.P.*, 63 F.E.R.C. ¶ 61,230 (1993).

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[2] "Avoided costs" are a utility's incremental costs for electric energy or capacity which, but for the purchase from the QF, the utility would generate itself or purchase from another source. *See* 18 C.F.R. §§ 292.101(b)(6) and 292.304(b)(2) (1998).

Tenaska designed the plant to meet these standards using the thermal output of the plant to produce distilled water that would be sold to an independent third party. To that end, Tenaska entered into a contract in 1994 with the City of Cleburne, Texas. The contract provided that the City would purchase all of the distilled water produced by the plant. But the contract also obligated Tenaska to purchase from the City all of its water for use in the plant's steam generators and all of its effluent water for use in the plant's cooling towers. The City was obligated to construct the facilities necessary for transporting the effluent water to, and the distilled water from the plant. In addition, the City was responsible for construction financing of the plant, through issuance of tax-exempt municipal bonds, for which reimbursement from Tenaska is received in monthly payments when debt service is due.

Tenaska sought certification from FERC that its plant would be a "QF" on the ground that the plant's thermal output would be used to distill water -- a common use -- which would be sold to an independent third party. Neither Brazos nor the City of Cleburne opposed certification of the plant. FERC granted Tenaska QF certification on that basis. *Tenaska IV Texas Partners, Ltd.*, 70 F.E.R.C. ¶ 62,026 (1995).

Tenaska's facility began commercial operation in January 1997 and has produced electricity, all of which has been and is being sold to Brazos pursuant to the power purchasing agreement. In addition, the distilled water produced at the plant has been and is continuing to be sold pursuant to the contract between Tenaska and the City. The City wanted the water to be able to attract new industries at a nearby industrial park, but not until September 1997 did the City attract a new industry to the

park. *Brazos Elec. Power Coop. v. Tenaska IV*, Pet. App. A at 8a-9a, 205 F.3d 234, 239 (5th Cir. 2000). In the interim, the City planned to use the distilled water to augment the flow of an otherwise stagnant local stream to improve public health and safety, but difficulties were encountered in obtaining the necessary federal and state permits. *Id.* As a result, for the first few months of the plant's operation, the City had no use for distilled water and discarded it. But within a few months, the City began delivering distilled water to a buyer. *Id.*

After the plant was operational, Brazos initiated litigation on several fronts in an effort to invalidate its contractual obligations to Tenaska.[3] Among other things, Brazos filed a petition at FERC to revoke the plant's QF status. According to Brazos, the sale of distilled water to the City was not "useful" within the meaning of FERC's QF regulations, 18 C.F.R. § 292.202(c), because Tenaska allegedly received only a monthly credit on its water supply bill of $10 for thousands of gallons of distilled water and also because the City did not resell the distilled water it received until a few months after the facility became operational.[4]

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[3] In addition to the litigation before FERC, Brazos initiated litigation before the PUCT and the District Court of Tarrant County, Texas, No. 67-170034-97. The PUCT rejected Brazos's claims. *Complaint of Brazos Elec. Coop., Inc.*, Order Dismissing Complaint, Docket No. 17878 (Texas PUC) (Nov. 6, 1997). The District Court litigation is in abeyance.

[4] Brazos also alleged that (a) the treatment of the steam in Tenaska's facility did not comply with governing FERC regulations, and (b) Tenaska did not satisfy QF ownership requirements. FERC declined to grant Brazos's petition on either of these grounds. Before the Fifth

FERC denied Brazos's petition, explaining that when a cogeneration plant's thermal output involves a common industrial or commercial application, such output is presumptively useful and no further analysis is performed. FERC noted that because it had already concluded that the production and sale of distilled water to third parties from a cogeneration plant is a common practice in the industry, the presumption applied. Moreover, since there is no statutory requirement that FERC determine whether such thermal output is being used in an economic manner or the downstream purpose for which the output is used, it would not entertain further inquiry into the economics of the downstream uses of presumptively useful thermal outputs such as distilled water. *Brazos Elec. Power Coop. v. Tenaska IV Texas Partners, Ltd.*, Pet. App. C at 53a, 83 F.E.R.C. ¶ 61,176 (1998).

Brazos filed a petition for rehearing, alleging that because the plant's distilled water was not actually being sold or put to a *bona fide* use, FERC should reconsider its position. FERC accepted Tenaska's representation that the $10 credit was but "one part of a multifaceted financial package" between Tenaska and the City, and thus found that commercial sales to a third party were in fact occurring. FERC also found that because it is common to use a cogeneration plant's thermal output to produce distilled water, such use is in fact a *bona fide* use. Accordingly, FERC denied Brazos's rehearing petition. *Brazos Elec. Power Coop. v. Tenaska IV Texas Partners, Ltd.*, Pet. App. B at 41a, 85 F.E.R.C. ¶ 61,097 (1998).

Circuit, Brazos challenged FERC's orders as to the second issue. The Court of Appeals affirmed. Pet. App. A at 27a. Brazos does not challenge this aspect of the decision below.

B. The Fifth Circuit's Affirmance of FERC Orders

Brazos next sought review in the U.S. Court of Appeals for the Fifth Circuit, re-arguing the same issues. Following *Motor Vehicles Mfrs. Ass'n v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*"), and *Bowman Transp. Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281 (1974), the Court of Appeals upheld FERC's Orders. Pet. App. A at 1a. Rehearing was also denied. Pet. App. D at 66a.

REASONS FOR DENYING THE WRIT

I. This Case Does Not Present Any Issue of National Importance.

This case does not present any issue of national importance. FERC's application of a presumption to determine the usefulness of a form of energy under 16 U.S.C. § 796(18) is not the subject of any other pending cases in the Courts of Appeals, nor has it been the subject of any prior case in any Court of Appeals.

Brazos attempts to cloak this case with national importance by claiming that "[t]he cost to consumers of compulsory electricity purchases from PURPA qualifying facilities is enormous." Pet. at 12 n.5. But this case does not involve a compulsory purchase from a QF. As explained above, before entering into the purchase power agreement with Tenaska, Brazos considered several different ways of obtaining sufficient supplies of electricity to meet its generating capacity shortfalls. R. 244-319, 477-78, *supra* at 1. Brazos accepted Tenaska's proposal and negotiated a power purchase agreement

with Tenaska because Tenaska would supply power at the lowest cost. R. 478, *supra* at 1. Thus, Brazos was never forced to enter into a contract with Tenaska; the contract was the result of arms-length negotiations after Brazos selected Tenaska's proposal as the most favorable.

This case does not even involve the fully avoided-cost rule under which a QF can by law compel the utility purchasing the QF's power to pay an amount equal to the utility's full avoided costs. Rather, the rate being charged by Tenaska for electric energy sold to Brazos is the product of good faith, arm's-length negotiations between Tenaska and Brazos. R. 471, *supra* at 1.[5]

This case is really about Brazos's attempt to get out of its contract with Tenaska because Brazos no longer views the contract as favorable to it. Brazos believes it can now purchase electric energy at lower prices than the prices in the contract and has initiated litigation on several fronts in an effort to be released from its agreement with Tenaska. But that effort has nothing to do with alleged PURPA abuse, for Brazos would be in the same position whether or not Tenaska's generating facility is a QF. Brazos's commercial concerns do not provide a conceivable reason for issuance of the writ.

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[5] These facts belie Brazos's contention that this case is the "poster child example of PURPA abuse that forces electricity consumers -- residential, commercial and industrial -- to pay higher electric rates, of billions of dollars per year, in order to subsidize independent power producers." Pet. at 18 n.7 (internal quotations omitted).

II. This Case Involves the Implementation of Well-Established Principles, Not the Establishment of New Principles.

Brazos's basic complaint is that FERC conclusively determined the thermal output of Tenaska's facility to be "useful" because it was used in a common process to produce distilled water, thereby foreclosing inquiry into the value of the distilled water to the City. The resolution of this complaint does not turn on principles which are in doubt. The principles here are well-established. All that is involved is the implementation of these principles to the circumstances of this case.

This Court has recognized that an administrative agency may use irrebuttable presumptions as evidentiary rules of law to further a particular legal or policy goal if the presumptions are reasonable and compatible with the underlying statutory scheme. *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359, 378 (1998). The presumption at issue here has two parts. The first is that the thermal output of a facility is "useful" within the meaning of 16 U.S.C. § 796(18)(a)(2) if it is used in a common industrial or commercial application or used to produce a common product. *Bayside Cogeneration, L.P.*, 67 F.E.R.C. ¶ 61,290, at 62,006 n.4 (1994); *Kamine/Besicorp Allegany L.P.*, 63 F.E.R.C. ¶ 61,320, at 63,158 (1993). The second part is that the use of a facility's thermal energy output to produce distilled water is "common." *Kamine/Besicorp Allegany L.P.*, 63 F.E.R.C. at 63,158. This two-part presumption is both reasonable and compatible with the statutory scheme.

The test for determining whether a facility's thermal energy output is "useful" within the meaning of 16 U.S.C. §

796(18)(a)(ii) is an economic test..*Electrodyne Research Corp.*, 32 F.E.R.C. ¶ 61,102, at 61,279 (1985). FERC generally relies on the marketplace to determine whether the thermal energy output is economically "useful." *Electrodyne*, 32 F.E.R.C. at 61,278 (1985) ("the ultimate determination of usefulness will be made in the marketplace"). Because a use of thermal energy output would not be a common practice in the industry unless it was economically useful in a market, FERC reasonably concludes that a "common" use of thermal energy output is economic. *Bayside Cogeneration,* L.P., 67 F.E.R.C. ¶ 61,290, at 62,005-06 (1994).[6]

FERC determines that a use is common if it has received sufficient applications proposing the same use for the thermal energy output because this shows that the technology involved is then established and that the thermal energy output is "useful." *Kamine/Besicorp Allegany L.P.*, 63 F.E.R.C. at 63,158; *Arroyo Energy, L.P.*, 63 F.E.R.C. ¶ 61,198, at 62,545 (1993); *Polk Power Partners, L.P., et al.*, 61 F.E.R.C. ¶ 61,300, at 62,128 (1992). FERC determined that thermal energy output is useful if it is used to produce distilled water, after receiving five applications proposing this use. *Kamine/Besicorp Allegany*

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[6] If the use of a facility's thermal energy output is uncommon, *i.e.*, one that involves a new technology or creates an end-product without an established market, FERC considers the statutory standard met if the output or product made by the output is sold to a non-affiliated third-party because FERC correctly assumes that no entity would buy the thermal energy unless it served a legitimate purpose. *Kamine/Besicorp Allegany L.P.*, 63 F.E.R.C. at 61,158. It is only if there is no market for the output, because the output is sold to an affiliate or is used by the generator itself, that FERC requires quantitative evidence that the use is economically justified. *Polk Partners, L.P.*, 61 F.E.R.C. ¶ 61,030, at 61,163-64.

L.P., 63 F.E.R.C. at 61,158. Thus, the presumption of "commonality," for the production of distilled water as well as other uses, is based on what is actually happening in the industry. This too is entirely reasonable.

The crux of Brazos's argument is that to satisfy the statutory standard, FERC must determine that the end-product of a cogenerator's thermal energy output is valuable in the hands of the purchaser. Pet. at 22. This argument is not grounded in the text of the statute. To meet the statutory test, a facility must produce "steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating or cooling purposes." 16 U.S.C. § 796(18)(A)(ii) (1994). Nowhere in the statute is it required that the usefulness standard be determined by the purchaser's use of the end-product. Therefore, in accordance with this Court's opinion in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) ("*Chevron*"), "the question is whether the agency's answer is based on a permissible reading of the statute." FERC's reading of the term "useful" is a permissible one, as the Fifth Circuit found. 205 F.3d at 244. This is clearly correct.

The purpose underlying PURPA is to encourage the development of cogeneration facilities. *FERC v. Mississippi*, 456 U.S. 742, 750 (1982) ("Section 210 of PURPA's Title II . . . seeks to encourage the development of cogeneration and small power production facilities"); *see also* H.R. Conf. Rep. No. 1750 at 98, *reprinted in* 1978 U.S.C.C.A.N. 7797, 7832 ("The establishment of utility type regulation over [qualifying cogeneration facilities] would act as a significant disincentive to firms interested in cogeneration . . ."). Congress entrusted to FERC the task of ensuring this statutory purpose: "[T]he

Commission shall prescribe, and from time to time thereafter revise, such rules as it determines necessary to encourage cogeneration . . . ." 16 U.S.C. § 824a-3(a) (1994).

Examining the value of a facility's thermal energy output in the hands of the purchaser (in this case, the City) as Brazos urges would undermine the statute's purpose, as well as FERC's mandate to develop rules to encourage cogeneration, because the certainty firms need to invest in these projects would be lost. For example, suppose that in this case, the City had a buyer for its distilled water at the time Tenaska began commercial operation, but another seller of distilled water entered the market and sells water at a lower price than the City, thus displacing the City's sales. Through no fault of Tenaska, which had a purchaser for its thermal energy output, the economic value of the end-product would be diminished, thereby undermining the QF status of the plant under Brazos's interpretation of the statute. If such a turn of events could potentially frustrate the status of the facility as a QF, the incentive to invest would be severely reduced. FERC's decision not to evaluate the secondary market of every third-party purchaser of QF power is clearly a permissible reading of the statute and was appropriately upheld as such by the Fifth Circuit. Pet. App. at 20a-21a.

Brazos's claims that FERC did not follow its precedent in applying a presumption in this case are wholly inaccurate. The Fifth Circuit fully analyzed the relevant case law and properly disposed of those arguments. The Fifth Circuit reviewed the agency's action and upheld it under *State Farm*, 463 U.S. at 43. Such a garden-variety implementation of black-letter administrative law does not warrant review by this Court.

III. The Rationale Used to Affirm FERC's Orders Was Also Used by FERC to Deny Brazos's Petition.

Brazos argues that the Court of Appeals decision is defective because it "supplies a rationale not used by the FERC." Pet. at 16. However, Brazos does not identify with sufficient clarity the alleged rationale the Fifth Circuit used to uphold FERC's orders that was not articulated by FERC itself. *See* SUP. CT. R. 14(4) (requiring a petitioner to plead "with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration"); *see, also, Mazur v. Stein*, 347 U.S. 201, 206, n.5 (1954) ("The fact that the issue was mentioned in argument does not bring the question properly before [the Court]"). For that reason alone, the Court should not consider this argument.

In any event, Brazos may be referring to its claim that FERC's "only given justification for the irrebuttable presumption was the suggestion that the possibility of hearings . . . would discourage cogeneration," while the Fifth Circuit justified the irrebuttable presumption as necessary "'to enable cogeneration facilities to obtain financing' by providing investor certainty." Pet. at 15, *citing* 205 F.3d at 246. There is no distinction in these statements. In the context of this case, the evidentiary hearing would be a post-certification challenge to the QF. FERC has noted that the "financeability" of QF projects "would be severely hampered" if post-certification challenges could be brought, a result not "consistent with Congress' directive that we encourage the development of QFs." *New York State Elec. & Gas Corp.*, 71 F.E.R.C. ¶ 61,027, at 61,118 (1995), *reconsideration denied* 72 F.E.R.C. ¶ 61,027 (1995), *petition for review dismissed* 117 F.3d 1473 (D.C. Cir. 1997).

The Fifth Circuit made the same point directly. Pet. App. A at 23a.

Accordingly, the writ should be denied because the Court of Appeals upheld FERC's orders on the basis of a rationale that was clearly articulated and specifically relied upon by the agency itself. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

IV. There is No Conflict Among the Circuits.

Contrary to Brazos's claim (Pet. at 13), there is no conflict among the Circuits. The decision Brazos points to as in conflict with the decision below, *Southern California Edison Co. v. FERC*, 195 F.3d 17 (D.C. Cir. 1999), involved a different provision of PURPA and a different question of law. At issue there was 16 U.S.C. § 796(17)(A)(i), which provides an exhaustive list of primary energy sources a "small power production facility" may use to produce electricity. FERC had certified a facility that primarily used an energy source for purposes not listed in the statute.

The court rejected FERC's action. The court noted that the purpose of PURPA was to encourage the development of small production facilities, just as it is to encourage the development of cogeneration, but concluded that the purpose was not enough to overcome the "text, structure and context of the statute," which left "no ambiguity to resolve at step two of *Chevron*." *Southern California Edison Co. v. FERC*, 195 F.3d at 27; *cf. American Petroleum Inst. v. EPA*, 198 F.3d 275, 278 (D.C. Cir. 2000) ("[I]f Congress makes an explicit provision for

apples, oranges and bananas, it is most unlikely to have meant grapefruit").

The case, in short, was a classic *Chevron* step-one case, in which the statute answers the precise question. As noted above, 16 U.S.C. § 796(18)(A)(2), which is at issue in this case, does not speak to the precise question. The statutory interpretation issue in this case is therefore a classic *Chevron* step-two question of whether the agency has given a permissible interpretation of the statute, and here FERC has. There is no conflict.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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No. 00-160

In the Supreme Court of the United States

BRAZOS ELECTRIC POWER COOPERATIVE, INC.,
PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION
AND TENASKA IV TEXAS PARTNERS, LTD.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission may presume that the thermal output of a cogeneration facility is "useful," thus permitting the cogeneration facility to meet the requirements of Section 3(18)(A) of the Federal Power Act, 16 U.S.C. 796(18)(A), where the thermal output is used in a common industrial or commercial process that produces a product sold to an independent third party.

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BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 205 F.3d 235. The orders of the Federal Energy Regulatory Commission (Pet. App. 41a-52a, 53a-65a) are reported at 83 F.E.R.C. ¶ 61,176 and 85 F.E.R.C. ¶ 61,097.

JURISDICTION

The judgment of the court of appeals was entered on February 29, 2000. A petition for rehearing was denied on April 28, 2000. The petition for a writ of certiorari was filed on July 27, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Public Utility Regulatory Policies Act of 1978 (PURPA), Pub. L. No. 95-617, 92 Stat. 3117, which amended the Federal Power Act, in response to a nationwide energy crisis during the late 1970s. *FERC* v. *Mississippi*, 456 U.S. 742, 745 (1982). Section 210 of PURPA encourages the construction of cogeneration and small power-production facilities. 16 U.S.C. 824a-3; 456 U.S. at 750. As defined by PURPA, a "cogeneration facility" produces both "electric energy" and "steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating, or cooling purposes." 16 U.S.C. 796(18)(A). Cogeneration facilities put the excess energy produced as a by-product of electricity generation to use for other purposes, thus increasing energy efficiency. See Pet. App. 3a.

Through PURPA, Congress sought to overcome two obstacles to investment in cogeneration and small power-production facilities: (1) traditional electric utilities' reluctance to enter into power purchases and sales with nontraditional generating facilities, and (2) financial burdens imposed by federal and state regulation. *FERC* v. *Mississippi*, 456 U.S. at 750-751. Section 210(a) of PURPA therefore directs the Federal Energy Regulatory Commission (Commission) to prescribe "such rules as it determines necessary to encourage cogeneration and small power production," including rules requiring utilities to offer to sell electricity to, and purchase electricity from, qualifying cogeneration facilities and small power producers. PURPA § 210(a), 16 U.S.C. 824a-3(a). Section 210(e) of PURPA, 16 U.S.C. 824a-3(e), directs the Commission to promulgate rules exempting qualifying cogeneration facilities and

small power producers from certain state and federal laws governing electric utilities. See generally *FERC* v. *Mississippi*, 456 U.S. at 751. Cogeneration facilities eligible to receive those benefits are known as "qualifying cogeneration facilities" or "QFs." Qualifying cogeneration facilities must meet standards for minimum size, fuel use, and fuel efficiency. 16 U.S.C. 796(18)(B)(i).

2. The Commission promulgated regulations implementing PURPA's provisions. Closely tracking the statute, the regulations define a cogeneration facility as "equipment used to produce electric energy and forms of useful thermal energy (such as heat or steam), used for industrial, commercial, heating, or cooling purposes, through the sequential use of energy." 18 C.F.R. 292.202(c). Applying this definition, the Commission has held that "for a thermal output to be 'useful,'" the thermal output "must have an independent business purpose with some economic justification." *Electrodyne Research Corp.*, 32 F.E.R.C. ¶ 61,102, at 61,278 (1985). This policy protects against the extension of QF status to facilities that generate thermal energy solely in an effort to receive the regulatory benefits of QF status, without any independent business purpose or economic justification.

In *Electrodyne*, the Commission provided "additional guidance" regarding its application of the "independent business purpose" test. 32 F.E.R.C. at 61,279. First, and most important for purposes of this case, the Commission stated that it would presume that thermal output is useful whenever the output is utilized in a "common industrial or commercial application[]." *Ibid.* In this situation, the fact that the thermal application is commercially proven establishes its usefulness, and the agency performs no further analysis regarding the

economics of the particular application. *Bayside Cogeneration, L.P.*, 67 F.E.R.C. ¶ 61,290, at 62,006 (1994); *Brooklyn Navy Yard Cogeneration Partners, L.P.*, 74 F.E.R.C. ¶ 61,015, at 61,046 (1996) ("[O]nce the Commission is satisfied that the proposed use of cogenerated thermal output in a particular manner is common, it will not inquire further into how the product is being used; *e.g.*, into the economics of the application."); *EcoEléctrica, L.P.*, 77 F.E.R.C. ¶ 61,117, at 61,451-61,452 (1996) (same). The Commission has recognized common applications of thermal output such as space heating, crop drying, and distilling water. *Electrodyne*, 32 F.E.R.C. at 61,278 (space heating and crop drying); *Kamine/Besicorp Allegany L.P.*, 63 F.E.R.C. ¶ 61,320, at 63,158 (1993) (distilling water).

The Commission also makes allowance for novel uses of a cogeneration facility's thermal output. If the cogenerator proposes an application that involves a new technology, or that has not previously been found to be economically justified, the Commission requires the cogenerator to prove that its particular application of thermal energy is economically justified. *Electrodyne*, 32 F.E.R.C. at 61,279. The cogenerator can make a prima facie showing of economic justification by providing evidence of an arms-length market for its thermal energy output, or for the end product of the cogenerator's own application of its thermal energy. *Ibid.* In those situations, the Commission assumes there would not be a market for the cogenerator's thermal output, or the end product that is produced using the thermal output, if the thermal output served no legitimate economic purpose. See *Liquid Carbonic Indus. Corp.* v. *FERC*, 29 F.3d 697, 700 (D.C. Cir. 1994). If the cogenerator's use of the thermal energy is not common and the cogenerator is not selling its

thermal output or the end product of its thermal process to a third party, the cogenerator cannot rely on an arms-length transaction and "quantitative evidence of economic justification will ordinarily be necessary." *Electrodyne*, 32 F.E.R.C. at 61,279.

3. On November 1, 1993, petitioner Brazos Electric Power Cooperative, Inc. (Brazos) entered into a 23-year, fixed-price power purchase agreement with Tenaska IV Texas Partners, Ltd. (Tenaska), under which petitioner agreed to purchase electric power produced by Tenaska's cogeneration facility in Cleburne, Texas. The Cleburne facility had not yet attained QF status, and petitioner was not under any requirement to purchase electricity from the plant.[1] Pet. App. 6a. Rather, petitioner chose to purchase power from the Cleburne plant based on its own business judgment. *Id.* at 6a-7a.

On October 24, 1994, Tenaska applied to the Commission for certification of the Cleburne plant as a QF under PURPA. Tenaska represented, in relevant part, that it would use the thermal output of the facility to produce distilled water for sale to a third party. Pet. App. 7a. The Commission had previously recognized distillation of water as a common application of thermal output. *Kamine/Besicorp*, 63 F.E.R.C. at 63,158. The Commission approved Tenaska's unopposed application, holding that Tenaska's use of the "thermal output for this purpose is common and, thus, is presumptively

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[1] Cogenerators typically obtain certification from the Commission before constructing a cogeneration facility. The Commission, however, may revoke the QF status of a previously certified facility if the facility fails to operate in conformance with the representations in its application for certification. 18 C.F.R. 292.207(d)(1).

useful." *Tenaska IV Tex. Partners, Ltd.*, 70 F.E.R.C. ¶ 62,026, at 64,081 (1995).

Following certification of the Cleburne cogeneration facility, Tenaska entered into a series of agreements with the City of Cleburne. Those agreements provided, among other things, that Tenaska would purchase water from the City's potable water supply for use at Tenaska's cogeneration facility, and sell distilled water produced by the facility back to the City. In addition to tax abatements, the City gave Tenaska a credit of ten dollars per month on its water bill for the production of distilled water. Pet. App. 8a, 18a. The City also agreed to finance and construct the facilities necessary to carry potable water to the cogeneration plant and distilled water from the plant. The City intended to use Tenaska's distilled water as an inducement to attract businesses to a nearby industrial park. Water that was not sold was to be used to augment the flow of a stream that had become stagnant. *Id.* at 8a.

Tenaska's plant became operational in January 1997. During the first eight months of operation, the City of Cleburne did not have an industrial purchaser for the distilled water. The City also lacked the environmental permits it needed to use the distilled water to augment stream flow. The City therefore released the distilled water into the City sewer system. In September 1997, however, an occupant of the industrial park began purchasing distilled water from the City. Pet. App. 8a-9a.

4. On August 22, 1997, Brazos petitioned the Commission to revoke the QF status of Tenaska's Cleburne cogeneration facility. Under the terms of petitioner's agreement with Tenaska, decertification would release petitioner from its obligation to purchase power from the plant. See Pet. App. 7a. Petitioner relied primarily

on the City's payment of only ten dollars per month for the distilled water produced by Tenaska, as well as the City's disposal of the distilled water in the sewer. Those facts, petitioner argued, showed that "Tenaska's distillation of water has not proven to be 'useful,' thus rebutting the presumption of usefulness on which Tenaska's QF status was certified." [2] *Id.* at 55a.

The Commission denied petitioner's request to revoke Tenaska's certification. Pet. App. 53a-65a. The Commission explained that under its precedents, the fact "that the proposed use of cogenerated thermal output in a particular manner is common" forecloses inquiry "into how the product produced by the thermal output is being used, *e.g.*, into the economics of the application." *Id.* at 61a-62a (citing *Brooklyn Navy Yard, supra*). Instead, the Commission "'assumes' that energy is useful within the meaning of the statute when it is used in a common process or used to produce a common product." Pet. App. 62a. Although there may be cases in which a particular qualified cogeneration facility, employing its thermal output for a common use, is not economic, the application of thermal energy nevertheless is useful. *Ibid.* The Commission therefore stated that because "Tenaska produces a product, distilled water, which has been found to be presumptively useful," the Commission would "not look into the economics of its sale of the product, or into how the

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[2] Petitioner made two other arguments, which the Commission rejected. Pet. App. 63a-65a. Petitioner sought judicial review of one of those issues (regarding ownership of the Tenaska facility), and the court of appeals affirmed the Commission. *Id.* at 26a-28a. Petitioner does not seek further review of that aspect of the court of appeals' decision.

product is being used by the unaffiliated purchaser of the product." *Ibid.*

The Commission denied petitioner's request for rehearing. Pet. App. 41a-52a. The Commission stated that although it would not scrutinize the economics of the contract between Tenaska and the City, it was convinced that Tenaska had made an actual sale of the distilled water to the City as a third-party purchaser. *Id.* at 47a-48a. The Commission also explained that reviewing the particular business arrangements surrounding a common application of thermal output would be inconsistent with Congress's intent in adopting PURPA. Providing an opportunity for evidentiary hearings every time an opponent challenges a cogeneration facility's compliance with the independent business purpose test "would seriously impede the very development of cogeneration and small power production the Congress sought to facilitate." *Id.* at 48a n.13 (quoting *American Paper Inst., Inc.* v. *American Elec. Power Serv. Corp.*, 461 U.S. 402, 420 (1983)).

5. The court of appeals rejected Brazos's petition for review. Pet. App. 1a-40a. The court concluded that the Commission has consistently refused to inquire into the economics of particular transactions when it finds that the thermal output of a facility is being put to a common use. *Id.* at 12a-17a. The court found that approach consistent with PURPA and the Commission's own regulations. "PURPA and its implementing regulations require only that the thermal energy be useful," the court explained. "[T]hey do not demand that the sale of every end-product be profitable. * * * Said differently, the issue is not whether the cogenerator makes money from its common application, but that, because there is a market for the application, it is capable of doing so." *Id.* at 17a.

The court of appeals went on to say that even if it "look[ed] behind" the Commission's presumption of usefulness, it would find that Tenaska entered into a legitimate arrangement for sale of its distilled water. Pet. App. 17a-18a. Moreover, petitioner's complaint that the distilled water produced at the Cleburne facility was not put to good use missed the point. Because distillation of water is a common application of thermal energy, the thermal output used in a commercial distillation process is "useful" for purposes of PURPA and the Commission's implementing regulations. What the purchaser of the distilled water does with the water it purchases is irrelevant. *Id.* at 19a-21a.

The court of appeals also identified policy reasons for refusing "to release Brazos from its contractual obligations" to buy power from Tenaska at prices that Brazos no longer finds attractive. Pet. App. 22a. The court expressed concern that if the Commission did review the economic justification for common applications of thermal energy, utilities that buy energy from cogeneration facilities might abuse that process in an effort to escape their long-term, fixed-price contracts with cogenerators. The resulting uncertainty, plus the burden of repeated evidentiary hearings before the Commission, would be contrary to Congress's intent to encourage investment in cogeneration facilities. *Id.* at 22a-26a.

Judge Emilio Garza concurred in the result. Pet. App. 29a-40a. Judge Garza agreed with the majority that the Commission's presumption of usefulness is a permissible interpretation of the statutory term "useful" in the context of initial certification of a cogeneration facility. *Id.* at 33a-35a. In his view, however, the majority placed too much weight on the burdens associated with evidentiary hearings after initial

certification. In the context of petitions to decertify a QF, he would have required the Commission to look beyond the commonness of the process in which the facility's thermal energy is being used, and consider whether the thermal energy is in fact useful on the facts of each case. *Id.* at 37a-40a. Judge Garza concurred in the result in this case, however, on the basis that Tenaska's thermal output was "'useful' in any sense of the word" because it was used to produce distilled water that Tenaska sold to the City. *Id.* at 36a-37a, 39a.

ARGUMENT

The Commission's determination that common commercial applications of thermal energy are "useful" for purposes of the definition of a cogeneration facility is consistent with the text of PURPA and with Congress's intent to encourage development of cogeneration facilities. The decision below, upholding the Commission's approach, does not conflict with any decision of this Court or any decision of another court of appeals. The court of appeals also cited alternative grounds for upholding the Commission. Accordingly, further review is not warranted.

1. Petitioner argues that the Commission has employed an irrebuttable evidentiary presumption to avoid the statutory requirements for QF status. Pet. 14-16. That is incorrect. The Commission's determination—that thermal energy used in a common commercial distillation process is useful—is itself an interpretation of PURPA. That administrative interpretation is consistent with the text of the statute and with congressional intent, as the court of appeals held.

As noted above, PURPA defines a "cogeneration facility" as a facility that produces "(i) electric energy, and (ii) steam or forms of useful energy (such as heat)

which are used for industrial, commercial, heating, or cooling purposes." 16 U.S.C. 796(18)(A). Applying the second prong of that definition, Commission rules provide that a cogeneration facility must produce, in addition to electric energy, "forms of useful thermal energy (such as heat or steam), used for industrial, commercial, heating, or cooling purposes." 18 C.F.R. 292.202(c). The line of agency decisions challenged by petitioner holds that a cogeneration facility produces "useful thermal energy * * * used for industrial, commercial, heating, or cooling purposes" when the plant's thermal output is employed in a common industrial or commercial application. See, *e.g.*, *Electrodyne*, 32 F.E.R.C. at 61,279.

The Commission's approach accords with the ordinary meaning of the term "useful." If a process is "[c]apable of being used advantageously or beneficially," then the process is "useful," even if it is not always put to good use. *The American Heritage Dictionary of the English Language* 1410 (1980 ed.); see also *Webster's Third New International Dictionary* 2524 (1993 ed.) (defining "useful" as "capable of being put to use"). Moreover, even if the statutory language were ambiguous, the Commission's interpretation, under which common thermal applications are useful, is reasonable because it fulfills Congress's intent to "encourage cogeneration." PURPA § 210(a), 16 U.S.C. 824a-3(a); see generally *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."). The Commission's interpretation avoids the administrative burden and uncertainty that would be associated with case-by-case

challenges to the usefulness of common thermal processes. The Commission's approach also promotes the stability and predictability of cogenerators' contractual relations with their customers, which further encourages investment in cogeneration facilities. See Pet. App. 22a-26a. As the court of appeals noted, "[o]wners of QFs would have little incentive to sell electric energy if they had to go through an evidentiary hearing before FERC in Washington, D.C., every time a utility claimed someone else was behaving inefficiently with a common application." *Id.* at 24a.

Petitioner puts great weight upon the court of appeals' observation that "[p]resumptions are overinclusive by definition." Pet. App. 24a; see Pet. 14. Petitioner ignores the very next sentence of the court's decision, which explains that regardless of this general feature of presumptions, "[the Commission]'s decision to apply one strictly in this case neither contravenes PURPA's mandates nor supercedes the discretion afforded agencies in interpreting their own regulations." Pet. App. 24a. That conclusion is correct. And it is dispositive of petitioner's argument that the Commission erred by adopting an irrebuttable evidentiary presumption, for such presumptions are subject to judicial review only "for their reasonableness and their compatibility with the [governing] Act." *Allentown Mack Sales & Serv., Inc.* v. *NLRB*, 522 U.S. 359, 378 (1998); see also *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 37-38 (1987) (recognizing validity of an irrebuttable presumption of a union's majority status during the year following its certification as a bargaining representative).

2. Petitioner maintains that the Commission's interpretation of PURPA could lead to "ludicrous results." Pet. 16. In particular, petitioner suggests that a plant's

thermal output could be deemed useful, and thus the plant could receive or maintain QF status, even though the end product of the thermal application is worthless. *Ibid.* Again, the court of appeals properly rejected petitioner's argument. It explained that the fact that a thermal process is common shows that "the technology is established and there is a market for the product." Accordingly, there is no need for the Commission to inquire further whether the thermal output has economic value. Pet. App. 20a-21a.

Similarly, there is no basis for petitioner's assertion that the Commission's decision in this case will open the door to "PURPA abuse." Pet. 18 n.7. Under the *Electrodyne* line of cases, the Commission investigates the actual transactions supporting a claim of usefulness whenever a plant's thermal output is not put to a common, commercially proven use. In this case, moreover, the Commission found not only that Tenaska's production of distilled water is a common commercial process, Pet. App. 48a n.13, but also that Tenaska made an "actual sale" of the distilled water to the City of Cleburne, *id.* at 47a. Such a finding—that the end product of the plant's thermal process is sold to an independent third party—provides specific protection against sham cogeneration arrangements. No third party would buy the product of a thermal process if the thermal process were not useful. Judge Emilio Garza concurred on precisely this basis, finding that Tenaska's sale of distilled water to the City "shows that the thermal energy produced by the Tenaska facility * * * is 'useful' in any sense of the word." *Id.* at 36a-37a.[3]

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[3] Petitioner speculates, without any record support, that the distilled water produced by Tenaska may not be useful for any purpose. Pet. 18-19. But as the court of appeals stressed, the

3. Petitioner further claims that it was denied an opportunity to disprove the usefulness of Tenaska's thermal output and that it was denied due process as a result. Pet. 19-21. Insofar as the Commission's interpretation of PURPA's "usefulness" requirement limited the factual questions before the Commission, petitioner could (and did) challenge that interpretation. Insofar as there were legitimate factual issues, moreover, petitioner had an opportunity to submit its evidence, including any evidence that Tenaska was not operating in accordance with the representations it had made to obtain initial certification. Pet. App. 51a. Petitioner failed to establish any such inconsistency, and particularly failed to disprove Tenaska's representation that it would sell the distilled water to a third party. See *id.* at 42a, 47a-48a.

In any event, petitioner's due process argument was not presented to the Commission or considered by the court of appeals. This is an additional reason why petitioner's due process claim does not merit review. See *Auer* v. *Robbins*, 519 U.S. 452, 464 (1997) ("Since, however, that argument was inadequately preserved in the prior proceedings, we will not consider it here."); *Lytle* v. *Household Mfg., Inc.*, 494 U.S. 545, 552 n.3 (1990) ("Applying our analysis * * * to the facts of a particular case without the benefit of a full record or

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question under PURPA and the Commission's rules is whether the thermal output of the Cleburne plant is "useful," *not* whether the distilled water produced by the plant ultimately is put to good use. Pet. App. 20a-21a. Furthermore, the City did find an industrial purchaser for the distilled water shortly after petitioner filed for decertification of the Cleburne plant. *Id.* at 9a.

lower court determinations is not a sensible exercise of this Court's discretion.").[4]

4. Petitioner asserts (Pet. 23-24) that the decision below conflicts with *Southern California Edison Co.* v. *FERC*, 195 F.3d 17 (D.C. Cir. 1999). In *Southern California Edison*, the District of Columbia Circuit held that FERC had misapplied a statutory provision not at issue here—the definition of a "small power production facility" in Section 3(17)(A) of the Federal Power Act, 16 U.S.C. 796(17)(A). Specifically, the court of appeals held that the Commission had ignored the word "solely" in the statutory language "solely by the use, as a primary energy source, of." See 195 F.3d at 23. That narrow decision under a different statutory provision has no relevance to this case.

Nor is there any conflict with Commission precedent. Petitioner asserts an inconsistency with *LaJet Energy Co.*, 44 F.E.R.C. ¶ 61,070 (1988), in which the Commission refused to certify a cogeneration plant where the proposed use of thermal energy (distillation of water, as in this case) was not economically justified. Pet. 25. *LaJet* was decided before the Commission found distillation of water to be a common commercial application of thermal energy. See Pet. App. 14a-15a. Following the analytic approach set out in *Electrodyne*, *supra*, the Commission determined that the then-novel technology of water distillation was not economically justified on the facts presented. 44 F.E.R.C. at 61,194-61,195. The Commission also stated in the alternative that "if the use of a project's thermal output may be

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[4] Petitioner also claims that the Commission violated its own procedures for summary disposition. Pet. 17 & n.6. That claim likewise was not addressed below, nor does it raise any question of sufficient importance to warrant review by this Court.

considered [common and therefore] presumptively useful" under *Electrodyne*, then the Commission would consider evidence, *submitted by the applicant itself*, that suggested the production of thermal energy was not economically justified. *Id.* at 61,195.

Assuming, *arguendo*, that *LaJet*'s alternative holding established an exception to *Electrodyne*, the exception would not help petitioner. Far from casting doubt on the economic justification for thermal output, as in *LaJet*, Tenaska's submission to the Commission suggested that Tenaska and the City of Cleburne entered into a legitimate transaction for the sale of distilled water. Pet. App. 47a-48a; see also *id.* at 17a ("Tenaska correctly points out that it received much more than ten dollars in its transactions with the City"). In short, if there were an inconsistency in the Commission's own precedent, which there is not, that inconsistency would not affect the outcome of this case. See *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990) (courts should not "decide questions that cannot affect the rights of litigants in the case before them") (citation omitted). Nor would such inconsistency at the agency level raise a question appropriate for review under this Court's Rule 10.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

BRAZOS ELECTRIC POWER COOPERATIVE, INC.,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION
and TENASKA IV TEXAS PARTNERS, LTD.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* EDISON ELECTRIC INSTITUTE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Edison Electric Institute adopts the questions presented in the Petition for Writ of *Certiorari* of Petitioner Brazos Electric Power Cooperative, Inc.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* EDISON ELECTRIC INSTITUTE IN SUPPORT OF PETITIONER

Amicus curiae Edison Electric Institute (EEI) respectfully prays that the Court grant the petition of Brazos Electric Power Cooperative, Inc., for a writ of *certiorari* to the United States Court of Appeals for the Fifth Circuit in this matter. EEI has obtained consent from Petitioner and Respondents to file this brief. EEI has filed those consents with the Clerk of the Court concurrently with the filing of this brief.*

* This brief was authored in its entirety by the undersigned counsel of *amicus curiae*. No person or entity, other than the named *amicus curiae*, and counsel and members thereof, made any monetary contribution to the preparation or submission of this brief.

INTEREST OF *AMICUS CURIAE*

EEI is the association of the United States investor-owned electric utilities, and their industry associates and affiliates world-wide. EEI's U.S. members serve about 90 percent of all customers served by the investor-owned segment of the industry. EEI members generate approximately 75 percent of the electricity used in the country, serving roughly 70 percent of ultimate customers. EEI frequently represents its U.S. members before Federal agencies, courts, and Congress in matters of common concern, and has several times filed *amicus* briefs before this Court on matters closely related to those raised in this proceeding.

EEI members must comply with all applicable requirements of the Public Utility Regulatory Policies Act of 1978 (PURPA), Pub. L. No. 95-617 (1978). In particular, PURPA Section 210 requires utilities to purchase power from "qualifying facilities" (QFs). 16 U.S.C. §824a. EEI has a strong interest in assuring that its members are not forced to purchase power from entities which do not truly qualify for PURPA benefits, especially because one of the benefits available to QFs is a very favorable rate for such purchases by utilities. In fact, many utilities have been required to purchase power from QFs at rates far in excess of the cost of power from alternative sources.

EEI has a strong interest in this proceeding to address the important issue of assuring that determinations of QF status by the Federal Energy Regulatory Commission (FERC) are based on the reasoned consideration of all relevant information available to the Commission. FERC's decision in this case, as upheld by the Fifth Circuit Court of Appeals, runs directly counter to FERC's responsibility to enforce the restrictions Congress placed on the availability of PURPA benefits. In this case, FERC refused to acknowledge the obvious fact that the facility at issue was a sham designed to evade the statutory and regulatory requirements for QF status.

As the national association of investor-owned electric utilities, EEI is in a position to reflect the impact of the issues raised by this proceeding from a broader perspective than can Petitioner, which is not an investor-owned utility. This brief *amicus curiae* demonstrates that the questions arising in the instant case are substantial and have broad implications for all entities subject to federal regulation, as well as the nation's electric utilities, their customers, and the investors who provide the substantial capital necessary to maintain the reliability, safety, and effectiveness of the nation's electric utility systems.

SUMMARY OF ARGUMENT

The decision of the Fifth Circuit in the proceeding below would allow any federal agency to remove or dramatically modify an explicit Congressional limitation merely by going through an absurd kind of definitional gymnastics exercise—the essence of sophistry in its worst sense. The Federal Energy Regulatory Commission (FERC)—just as any other Federal administrative agency—must not be permitted to avoid its responsibilities to rationally administer a statutory program by referring to only one purpose of that complex program. Congress could not have intended—and indeed did not intend—that cogeneration-based "qualifying facilities" (QFs) could obtain the highly favorable rate treatment available under the Public Utility Regulatory Policies Act of 1978 (PURPA), Pub. L. No. 95-617 (1978), despite extravagantly wasting thermal energy through literally throwing away the useful product of that thermal energy.

The specific result obtained by the ruling of the court below turns PURPA on its head and obtains a result that is exactly the kind of waste that PURPA was intended to alleviate. As a result, the economy will be burdened even more by an already dysfunctional program. The general result of the ruling is to permit the administrative branch to completely ignore the explicit intent, as well as the general will, of the legislative branch.

BACKGROUND

PURPA has been at issue before this Court several times, and we adopt Petitioner's factual statement herein, therefore this background will be brief. *See, e.g., American Paper Institute v. AEP Service Corp.*, 461 U.S. 402 (1983); *FERC v. Mississippi*, 456 U.S. 742 (1982). PURPA was passed in the late 1970s as a response to the so-called "energy crisis" of the early '70s. In essence, PURPA was intended to reduce unnecessary and inefficient uses of fossil fuels. This was to be done by encouraging the use of alternative fuels and encouraging greater efficiency in using fuels, including their use in the production of electricity. *See* 16 U.S.C. §2601.

The primary intent of PURPA was to reduce, or at least make more efficient, the use of fossil fuels. In order to accomplish that primary goal, PURPA created a class of electric generation facilities known as "qualifying facilities," or QFs, because they would qualify for special benefits by virtue of meeting certain requirements. Among those benefits were the right to require utilities to purchase their power at favorable rates (the "avoided cost" rate). The creation and promotion of QFs and QF generation was only a secondary goal—one of several means to a much more significant end.

Of those QFs, one sub-class was "cogeneration" QFs. 16 U.S.C. §796(18). Cogenerators were to take thermal energy that already was being, or would be, partially used in some industrial or commercial process, and the rest of which was being discarded, and were to use that otherwise discarded thermal energy to produce electricity. Congress's understanding—as FERC itself reflected—was that "useful thermal energy (such as heat or steam)" produced by consuming fossil fuel and hitherto only "used for industrial, commercial, heating, or cooling purposes," was instead generally powerful enough to be used for more than one purpose, such as "produc[ing] electric

energy . . . through the sequential use of [such thermal] energy." *See* 16 U.S.C. §796(18)(A)(ii); 18 C.F.R. §292.202(c).

REASONS FOR GRANTING THE PETITION

Congress did not explicitly define the term "useful thermal energy." Thus FERC has had to define the term. However, FERC was not left completely to its own devices in making such an interpretation. It is obvious from the explicit text of PURPA that Congress intended to refer to thermal energy actually used in some "industrial, commercial, heating, or cooling" process.

In other words, Congress clearly must have been referring to a thermal process which yielded something that was itself truly "useful" in the common sense of the word: *actually* used or usable by society, not just discarded immediately after production, even if that discarded waste could theoretically be considered *potentially* usable by someone at some time. Otherwise, there would have been no reason in the first place for Congress to have defined a category of *co*generation QFs, much less to have also imposed requirements regarding sequential use, operation, and efficiency. *See* 16 U.S.C. §796(18); 18 C.F.R. §§292.202(c)-(i), 292.202(s), 292.203(b), 292.205; *see also, Independent Power Producers of New York*, 80 FERC ¶61,125, *esp.* at p.61,398 (1997) (FERC affirms state program for "ensuring that the facilities that receive the economic and regulatory benefits accorded QFs under PURPA actually comply with the requirements for QF status as established by Congress and [the] Commission").

In fact, under the reasoning of FERC as upheld by the Fifth Circuit, all electric generation facilities that utilize steam to drive a turbine could claim to be "cogeneration" facilities, since one of their "thermal outputs" is steam no longer usable for generating power—*i.e.*, water in a form only slightly removed from that of the "distilled water" in this case. Moreover, when that waste steam is condensed back into water and reused as coolant and/or feedwater to make more steam (as is done in many

steam-turbine electric generation plants), there will be even less overall environmental waste than there is in this case, where the water was actually flushed down the sewers and not even used to help cool the generating equipment. A more foolish, self-defeating construction of a statutory requirement intended to promote efficiency and conservation cannot be imagined.

We must admit to some sympathy for the practicality of the argument that FERC should not be required to investigate the economics of every cogeneration QF. However, in this case FERC was presented with clear and unrebutable evidence of actual waste. We are not suggesting that FERC should require QF operators to prove their economic viability in advance. However, FERC certainly must not be allowed to overlook the painfully obvious evidence brought before it. To allow FERC to do so in this case is to condone any and every trick of logic by FERC and all other Federal agencies to evade any Congressional limitations on governmental benefits—limitations imposed precisely in order to ensure that Congress's actual intent is accomplished, rather than some distorted caricature thereof.

Finally, we note for the Court that the entire program of "avoided-cost" rates under PURPA has long been dysfunctional, and the result of the decision below will be to exacerbate an already egregious situation. The PURPA Reform Group (PRG) has estimated that this case alone will result in almost $900-million in excess electricity costs over the life of the contract. PRG *Motion to Intervene, etc., Tenaska IV Partners, Ltd.*, FERC Docket No. EL97-56-000 (Oct. 3, 1997). PURPA avoided-cost pricing overall has been estimated to be responsible for approximately $8-billion per year in unnecessarily high electricity prices. Utility Data Institute, *Measuring the Competition: Operating Cost Profiles for U.S. Investor-Owned Utilities 1995* (1996). (While the data may be slightly different by this time, power-purchase contracts under PURPA typically run for 20 or 30 years.) Thus, it is clear that this case just makes a very bad situation even worse.

Nonetheless, the primary problem evinced by this case is much more fundamental. Despite our disagreement with the wisdom of PURPA, or our long-standing opposition to the manner in which avoided-cost rates have been developed over the years, FERC's ruling, and the Fifth Circuit's holding below, should not be allowed to establish precedent for Federal agencies. The administrative branch must not be permitted to turn a statutory program completely on its head in order to produce a result so obviously contrary to the spirit and primary intent of the complex program which the legislative branch took great pains to create.

CONCLUSION

WHEREFORE, Edison Electric Institute prays that this Court grant Brazos Electric Power Cooperative's Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Fifth Circuit in this matter.

Respectfully submitted,

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IN THE

Supreme Court of the United States

BRAZOS ELECTRIC POWER COOPERATIVE, INC.,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION
and TENASKA IV TEXAS PARTNERS, LTD.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

National Rural Electric Cooperative Association ("NRECA") is a not-for-profit national service organization representing approximately 930 rural electric cooperative members ("RECs") in 46 states providing electricity to nearly 35 million consumers. RECs are owned and controlled by the consumers they serve. Petitioner, Brazos Electric Power Cooperative, Inc. ("Brazos"), is a member of NRECA.[1]

INTRODUCTION

In order to promote the efficient use of fuel and to reduce imports, the Public Utilities Regulatory Policies Act ("PURPA") authorizes the Federal Energy Regulatory Commission ("FERC") to exempt "qualifying cogeneration facilities" from State and Federal rate and other utility regulation and to confer other valuable benefits on them. PURPA requires that the co-product of a cogeneration facility be produced for a business purpose independent from electricity production and that the co-product be "useful," that is, not merely support qualifying facility status. The Cleburne Plant produced electricity that it sold to Brazos at non-regulated rates, plus millions of gallons of water that the City of Cleburne nominally purchased for $10 per month and then poured down its sewers as waste. Applying an irrebuttable presumption that production of a common product is economically useful, the FERC held that the

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1. This brief is filed with the consent of Petitioner and both Respondents. NRECA states that this brief has not been authored in whole or in part by counsel for any party and that no person or entity, other than NRECA, has made a monetary contribution to the preparation or submission of this brief.

Cleburne Plan was a qualifying cogeneration facility without regard to Brazos' evidence. The questions presented on appeal are:

1. Where there exists a statutory and regulatory requirement that in order to obtain the benefits that Congress accords to a qualifying cogenerator the product produced by cogeneration must be useful, can an agency satisfy that requirement by conclusively presuming that where a thermal output (here, distilled water) is "common," it is useful, even in the face of a demonstration that the millions of gallons of the distilled water "sold" for $10 per month are discarded down a sewer?

2. Can an agency avoid the statutory language that requires a determination of usefulness by applying an irrational and arbitrary but conclusive presumption of usefulness to avoid the necessity for finding that which the legislature requires to be found?

ARGUMENT

NRECA supports Brazos' Petition for a Writ of Certiorari. Brazos raises significant issues of whether an agency may make statutorily required findings based solely upon the application of irrebuttable presumptions and, specifically, of whether the FERC could find that Tenaska IV Energy Partners produced a useful product under PURPA based solely on presumptions and without weighing evidence. NRECA is not collaterally attacking PURPA, but is supporting Petitioner with respect to how PURPA is being implemented and its impact on America's consumers.

If the holdings below are allowed to stand, NRECA's members — America's consumer-owned electric cooperatives — could be required to sell power to, and purchase power from, facilities like the facility owned by Tenaska. That facility had been determined by the FERC to be a qualifying facility under PURPA, notwithstanding its failure to produce a useful product.

The central purpose of PURPA's cogeneration provisions is meaningful energy conservation. Pursuant to those provisions, qualifying producers of electricity receive "PURPA benefits" when they demonstrably save fuel through the sequential use of energy by producing electricity along with a separate useful product. Upon FERC determination that such facilities are "qualifying facilities," PURPA benefits include the right for the owner of such facilities to demand that one or more electric utilities purchase the sequentially generated power. The seller is not required to price power at competitive market rates or at cost, but can require a purchase price equal to the purchasing electric utility's "avoided cost," the amount it would have cost the purchasing utility to generate the purchased power itself.

When electric utilities are compelled to make these purchases, they forego purchases from less costly sources, i.e. purchases made at lower market rates. The increased costs incurred by the purchasing utility are then passed along to consumers. Thus, determinations that particular facilities constitute "qualifying facilities" have a direct financial impact on the nation's consumers.

In the instant appeal the product at issue is distilled water purchased for a *de minimis* fee and flushed down a sewer.

By determining the product is useful and by refusing to consider contrary evidence, the Commission failed to follow congressional intent as expressed in PURPA.

Distilled water can be produced by most electric generating plants in the United States. In the instant case, the distilled water is disposed of in a sewer. Thus, the Commission's decision and the holding of the United States Court of Appeals for the Fifth Circuit affirming that decision may jointly operate — pursuant to PURPA's mandatory purchase requirements — to require electric cooperatives, other utilities and, ultimately, America's consumers, to pay for electricity from facilities that do not produce useful products and waste fuel (and, in this instance, water).

There are many so-called PURPA plants, which, in combination, already sell electricity at billions of dollars above cost and above market based rates. The holding below, if allowed to stand, can cause those sales to increase. As recognized by Judge Emilio Garza in his concurring opinion: "By establishing an irrebutable presumption that prevents it from ever examining whether a facility's co-produced energy is ever 'useful,' FERC has opened the door to facilities who [sic] meet FERC's technical requirement but defy the language and spirit of PURPA." *Brazos Electric Power Cooperative v. FERC*, 205 F.3d 235 at 252-53 (5th Cir. 2000) [footnote omitted].

Although the cogenerator in this proceeding receives a mere ten dollars per month for its "useful" water, Brazos estimates that Brazos could pay as much as $890 million for the electricity produced in sequence with that water. The very fact that only ten dollars is received demonstrates, by itself, the absence of a market for the water and that the

sale of such water does not effectively bring in incremental revenue; the fact that such water is immediately disposed down a sewer further demonstrates it is not a useful product; and the fact that Tenaska received just ten dollars per month whether it produced one hundred or one million gallons of water shows that the water was not really distilled and sold for a commercial purpose. Yet the holding below, if allowed to stand, requires Brazos to purchase electricity from Tenaska's "qualifying facility."

American electric consumers should not be required to pay above cost or above market rates for electricity not produced as intended by Congress in PURPA.

CONCLUSION

For the forgoing reasons, the writ sought by Brazos should be granted and the decision of the Fifth Circuit summarily reversed. Alternatively, the case should be set for briefing and argument.

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties below are those listed in the caption. Brazos Electric Power Cooperative, Inc. is an electric cooperative, which is owned by its member electric distribution cooperatives in Texas, which in turn are owned by those who purchase electricity from the cooperatives.

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I. This Case Presents The Important Issue Of When An Irrebuttable Factual Presumption Can Be Used To Establish A Statutory Prerequisite To An Entitlement In The Face Of Evidence Refuting That Presumption; This Is Not A Routine *Chevron* Case

FERC denies "that the Commission has employed an irrebuttable evidentiary presumption to avoid the statutory requirements of QF status," *viz*, whether the production of distilled water at Tenaska's Cleburne Plant was "useful." FERC Br. at 10. Rather, it claims to have adopted a permissible statutory interpretation of 16 U.S.C. § 796(18)(A), Pet. App. 71a, that steam used to produce a common product is *per se* "useful thermal energy . . . used for industrial, commercial, heating, or cooling purposes." FERC Br. at 10-11, *quoting* 18 C.F.R. § 292.202(c), Pet. App. 82a. It argues that its construction passes muster under *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). FERC Br. at 11. Contrary to FERC's argument, neither FERC decision below nor any other Commission order announces such a construction of the statute. FERC stated expressly that it was applying a "presumption" that was not rebuttable by Brazos' evidence, as the court below clearly understood. Moreover, even if FERC's order were based not on an irrebuttable presumption but on a construction of the governing statute and had been affirmed on that basis, the case would be worthy of *certiorari*.

A. FERC Has Applied An Irrebuttable Presumption

FERC stated below that because the use of steam to distill water is common, the Commission "presumes" or "assumes" that Tenaska's use of steam at the Cleburne Plant is useful within the meaning of PURPA, and, therefore, that it would not "look into the economics of [Tenaska's] sale of the product, or into how the product is being used by the unaffiliated purchaser of the product." Pet. App. 59a–62a. On rehearing, FERC amplified the point. Addressing Brazos' observation that past Commission decisions had conceded that a common use of thermal output is not necessarily useful, FERC responded not that Brazos'

challenge is contrary to the statute, as it would be if steam used to create a common product were useful by definition, but rather that "the statute *allows* our inquiry to end when, as here, a QF's use is shown to be common." Pet. App. 49a (emphasis added).

The court below clearly understood that FERC had applied a factual presumption, and just as clearly accepted that it could legally do so. The court conducted a careful review of FERC's precedents, Pet. App. 12a–17a, and concluded (at 14a): "Given the consistency with which FERC has denied further inquiry into common thermal applications, nothing in these precedents persuades us that FERC's presumption of usefulness is rebuttable, even post operation, by the two sets of facts Brazos presents." Even FERC's Question Presented admits that the issue is whether FERC "may *presume* that the thermal output of a cogeneration facility is 'useful'" in the context presented here (FERC Br. at (I), emphasis added).

FERC does not cite any language in its orders below to show that it interpreted PURPA to provide that, as a matter of law, "thermal energy used in a common commercial distillation process is useful" for purposes of PURPA, which is the proposition now advanced before this Court (FERC Br. at 10-12). Indeed, there is *no* FERC order to this effect. The only citation in FERC's brief for this proposition is to the leading case on the usefulness requirement, *Electrodyne Research Corp.*, 32 F.E.R.C. ¶ 61,102, at 61,279 (1985) (FERC Br. at 11). But *Electrodyne* holds that the statutory criterion of usefulness is an economic question. It does not state that all common uses of steam are *conclusively* deemed useful for purposes of PURPA; the order merely states that "common industrial or commercial applications are presumptively useful." *Id.*

FERC acknowledges, as it must, that in order to satisfy the statutory prerequisites for the receipt of QF benefits — to be "useful" — the thermal output "must have an independent business purpose with some economic justification." (Br. at 3, quoting *Electrodyne*, 32 F.E.R.C. at 61,278.) FERC continues by explaining that this policy is needed to "protect[ ] against

the extension of QF status to facilities that generate thermal energy solely in an effort to receive the regulatory benefits of QF status, without any independent business purpose or economic justification." (Br. at 3.)

Here steam was being used to produce millions of gallons of distilled water which was poured into sewers, using just enough thermal energy to meet FERC's minimum percentage for QF status during the Cleburne Plant's first 12 months of operation. Not only was the "price" paid for this water, $10 per month, clearly an amount far below the cost of producing 150,000 gallons of distilled water per day,[1] but Tenaska received *no* incremental revenues for *any* gallon it produced. Yet rather than reaching the obvious and inevitable conclusion that the thermal energy was being used solely "to receive the regulatory benefits of QF status, without any independent business purpose or economic justification," for the first time in the case of an operating generator FERC refused to examine whether there was any independent business purpose or economic justification for the use of steam to distill water. It did so, as it explains (Br. at 7, *quoting from* Pet. App. 62a) by *assuming* "that energy is useful within the meaning of the statute when it is used . . . to produce a common product."

FERC's substitution of the production of a common product for the statutory requirement that the product be produced for an industrial or commercial purpose — that there be an independent economic justification for the use of steam or thermal energy — is irrational. FERC's 1995 order certifying the Cleburne Plant as a QF cited *LaJet Energy Co.*, 44 F.E.R.C. ¶ 61,070 (1988), as a case that "clarified" the *Electrodyne* rule. *Tenaska IV Texas Partners, Ltd.*, 70 F.E.R.C. ¶ 62,026, at 64,081 (1995). And as FERC all but concedes, FERC Br. at 15-16, *LaJet* contradicts the construction of *Electrodyne* that FERC urges here, because *LaJet* holds that if an applicant for certification submits evidence suggesting that a facility's use

1. This average figure came from the City's public works director, who stated that he was unsure of it, as the City was not metering the deliveries. *See* C.A. App. 94.

of thermal energy to produce a common product for sale is *not* economically justified, FERC will consider that evidence, even if the thermal use is common and thus *presumptively* useful. 44 F.E.R.C. at 61,196.[2]

In sum, FERC's contention that its denial of the relief sought by Brazos without evaluating Brazos' evidence was predicated on something other than the application of an evidentiary presumption is not credible. FERC's orders and the decision of the court below all show that the Commission applied a presumption of usefulness not rebuttable by Brazos' factual allegations notwithstanding the relevance of those allegations under the statute.

FERC cites *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359 (1998), and *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987), apparently to suggest that formulation of irrebuttable presumptions by administrative agencies is a permissible practice under settled precedent and does not warrant this Court's further attention. (FERC Br. at 12.) However, the presumption "recognized" in *Fall River Dyeing*, concerning a union's majority status during the year following its certification as a bargaining representative, is a direct outgrowth of a statutory provision. As this Court explained in *Brooks v. NLRB*, 348 U.S. 96, 101-02 (1954), the NLRB had employed a *rebuttable* presumption prior to the enactment in 1947 of 29 U.S.C. § 159(c)(3), which bars new elections for twelve months following certification. And the discussion of "counterfactual evidentiary presumptions" and categorical

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2. As *LaJet* shows, FERC's presumption of usefulness is not *always* irrebbutable. Instead, the rule first announced in *Bayside Cogeneration, L.P.*, 67 F.E.R.C. ¶ 61,290 (1994), and first applied in the post-operation context in this very case (*see* Pet. App. 15a), is that the *Electrodyne* presumption is not "rebuttable upon the submission of economic evidence *by a party opposing certification*," because FERC postulates that allowing an opportunity for trial-type evidentiary hearings on the usefulness of a common co-product would impede development of cogeneration facilities. 67 F.E.R.C. at 62,006 & n.5 (emphasis added).

exclusion of evidence "without reference to its inherent probative value" in *Allentown Mack*, 522 U.S. at 378, is an aside in a case that concerned the weight properly accorded to certain evidence and the appropriate standard of proof. In any event, *Allentown Mack* states that even "clearly announced" irrebuttable presumptions or rules of evidentiary exclusion "would of course be subject to judicial review for their reasonableness and their compatibility with the [governing statutes]." *Id.* In this case, FERC's application of the irrebuttable presumption to an operational plant is unprecedented. Pet. at 5-6; Pet. App. 15a.

Moreover, there is nothing reasonable about the notion that using a small fraction of the steam produced at an electric generating station to distill water necessarily has an independent business purpose and economic justification apart from obtaining QF benefits. Whether there is even a market for distilled water is dependent on such factors as degree of purity and transportation costs to a site with a need for water of the quantity and quality produced. All FERC knows, and under its irrebuttable presumption all that it will ever know, is that it has received a number of applications for initial QF certification proposing to distill water and, therefore, it has determined that production of distilled water by QFs is common. But, as Brazos has stated (Pet. at 22), and the briefs in opposition do not even attempt to challenge, for a given generator to produce distilled water requires merely a container filled with water under heat. The cost is low compared to the hundreds of millions of dollars of PURPA benefits made available by Congress to legitimate QFs. FERC properly recognized in *LaJet* that PURPA creates powerful economic incentives for a generator to install and operate a water distillation plant even where the plant would not be profitable on its own. And FERC's comment that "[n]o third party would buy the product of a thermal process if the thermal process were not useful" (FERC Br. at 10) is astounding here, where there is an obvious motive for Cleburne to agree to spend $120/year to buy unneeded water: assisting

Tenaska in obtaining and maintaining QF status so that it would build and operate a much-desired plant in that community.

FERC suggests that providing an opportunity for evidentiary hearings each time there is a substantial challenge to a cogeneration facility's compliance with the independent business purpose test "would seriously impede the very development of cogeneration and small power production that Congress sought to facilitate." Br. at 8, *quoting* Pet. App. 48a. But that assertion is blind to the distinction drawn by Congress between legitimate cogeneration products and those which serve no economic purpose other than to obtain PURPA benefits. Congress only sought to develop cogeneration that promotes energy efficiency by producing useful co-generated products, not "cogeneration" which, as here, wastes fuel. FERC's concern over the impact of granting "the opportunity for evidentiary hearings" is a quarrel with Congress and, indeed, with the rule of law.[3] FERC cannot use its presumption "to avoid the necessity for finding that which the legislature requires to be found." *United Scenic Artists, Local 829 v. NLRB*, 762 F.2d 1027, 1034 (D.C. Cir. 1985).

Even if FERC's presumption of usefulness were sufficiently rational to be allowable as a rebuttable presumption, Court review is warranted to explore when and under what circumstances an agency can adopt an irrebuttable presumption that permits parties to receive benefits at the expense of other parties without providing an opportunity for the disadvantaged parties to show that statutory requirements have not been met.

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3. There are a number of approaches FERC could consider to reduce the need for evidentiary hearings. One possible approach might be to grant safe harbors under certain circumstances to applicants who have business plans showing that they have legitimate prospects of profit on the co-generated product. If that approach is utilized, presumably, the entities providing the financing will demand review of the business plans and money will not be forthcoming without a proper plan. Another might be to establish *rebuttable* presumptions combined with expedited review procedures. Approaches such as these could be established in a rulemaking or other proceeding. However, FERC's task is to conform with — not negate — commands of Congress.

B. The Statutory Construction Advanced Here By FERC Is Worthy Of *Certiorari*

Should the Court elect to credit the dubious proposition that FERC refused to consider Brazos' evidence because FERC has determined for purposes of PURPA that all common co-products are *necessarily* useful, then this case still merits review. Admittedly, on this view the case would no longer give this Court an opportunity to give clear guidance as to when administrative agencies may establish irrebuttable evidentiary presumptions. However, the other reasons for granting the writ would remain: (1) the national economic importance of the statutory question presented and (2) the presence of a clear conflict with *Southern California Edison Co. v. FERC*, 195 F.3d 17 (D.C. Cir. 1999). They remain because there is no *practical* difference between saying that a common coproduct satisfies PURPA's usefulness requirement as a matter of law and saying that PURPA allows FERC to apply a *presumption* of usefulness that is not rebuttable by evidence submitted by an opposing party. Either way, the would-be cogenerator's entitlement to PURPA benefits is made unassailable.

There is no serious debate concerning the economic importance of the issue. PURPA gives generators leverage to negotiate power contracts at favorable rates and then screens those rates from review for "justness and reasonableness" by federal or state regulators. FERC observes that Brazos was under no obligation to contract with Tenaska because the Cleburne Plant had not yet been certified as a QF (FERC Br. at 5; *cf.* Tenaska Br. at 7, emphasizing "arm's length negotiations"), but the sequence is irrelevant because QF status was intended and, at least at the pre-operating stage, unquestionably available. And the Plant's QF status led the PUCT to dismiss Brazos' complaint before that body. (Tenaska Br. at 4, note 4.) Nationally, as noted in the briefs of *amici*, the cost of PURPA status to consumers is billions of dollars annually.

The conflict with *Southern California Edison* is also clear. There, FERC argued that to directly promote PURPA's statutory

purpose of encouraging energy conservation, it could adopt a construction of 16 U.S.C. § 796(17)(A)(i), Pet. App. 69a. that essentially read the word "solely" out of the statute. Here, FERC argues that to promote the statutory purpose of encouraging cogeneration, it may construe 16 U.S.C. § 796(18)(A), Pet. App. 71a, to eliminate the words "purposes," that is, the element of intent. PURPA does not dictate *what* a cogenerator must do with steam or heat not used to generate electricity so much as *why*. If PURPA spoke of a *process* rather than intentions then, as the court below recognized, a cogenerator could itself distill water with the intent of disposing of that water down the sewer. Pet. App. 22a. Yet FERC contends (Br. at 9) that it may permissibly construe the statute to bar inquiries into commercial intent because such inquiries could induce litigation, and the court below agreed. There is a clear and important conflict between two circuits on whether FERC may, purportedly to serve PURPA's broad goals, ignore express statutory limitations on eligibility for QF benefits.

II. The Dispositive Facts Of This Case Are Clear

Tenaska, for its part, attempts to muddy the facts in order to make this case appear inappropriate for Supreme Court review. Specifically, Tenaska contends that "FERC accepted Tenaska's representation that the $10 credit for distilled water was 'but one part of a multifaceted financial package' between Tenaska and the City, and thus found that commercial sales to a third party were in fact occurring." (Br. at 5.) In fact, as FERC's brief at 7-8 accurately reflects, FERC noted Tenaska's allegation but did not accept it, reasoning that under its presumptions there was no need to examine the economics of the sale to establish the legitimacy of the sale. *See* Pet. App. 47a–48a.

To the extent that there is any difficulty, it arises from the fact that the appeals court mistakenly believed that FERC had determined that the Distilled Water Supply Agreement was part of an "integrated financing package" (Pet. App. 12a), and proceeded to affirm the phantom finding, concluding: "Seen in the context of a complex project financing, Tenaska's

arrangement with the City garnered it more than ten dollars a month" (Pet. App. 18a). The factual problem with this line of argument is that, although Tenaska and Cleburne clearly do have a set of complex contractual arrangements involving financing, tax abatements, purchase of treated effluent and the like, Tenaska offered no evidence suggesting that the tax abatements, etc., were hidden payments for the distilled water. All record evidence is to the contrary.[4]

The posture of this case is that FERC, believing that it would contravene the purposes of PURPA to hold an evidentiary hearing on Brazos' claim that Tenaska had no *bona fide* independent commercial purpose for producing distilled water at the Cleburne Plant, denied Brazos' request for relief based on its presumption without investigating the facts. On judicial review, Brazos' allegations must be assumed to be true.

In addition to being improper and unfounded, the appeals court's belief that the distilled water sale was part of an integrated financing package is beside the point, because it does not address the critical question of whether Tenaska's use of steam to distill some 150,000 gallons of water per day during the twelve month period from September 1996 to August 1997 was for an independent commercial purpose. Irrespective of the larger context of the arrangements between Tenaska and Cleburne, it is uncontested that Tenaska received $120 under the Distilled Water Supply Agreement for all of the distilled water that it produced between September 1996 and August 1997. It is uncontested that Tenaska would have received this same $120 no matter whether it produced 60 million gallons of distilled water or *no* gallons of distilled water, and that the contract did not require Tenaska to produce any particular quantity of distilled water. Tenaska never alleged that other consideration

4. The best evidence is the Distilled Water Supply Agreement itself, which (1) contains an integration clause (¶ 19.D) that negates any contention that it is part of a larger arrangement, (2) is terminable by Tenaska at its discretion with thirty days' notice (¶ 3.B), and (3) does not require Tenaska to produce any minimum quantity of distilled water (¶¶ 1.A, 4) or even to make any effort to do so. C.A. App. 172-85.

it received from Cleburne was tied to the quantity of distilled water produced at the Plant. It is uncontested that the City had no use for any of this water, and that it all went down the sewer, because the City does not claim to have located a purchaser for the water until September 1997. Pet. App. 9a. Tenaska itself claims that during this twelve month period, it used 5.26% of the total energy output of the Cleburne Plant to distill water, C.A. App. 384-86, which, as it happens, exceeds by a small margin the 5% minimum established by FERC's regulations for qualifying cogenerating facilities. 18 C.F.R. § 292.205(a)(1), Pet. App. 85a. And, finally, it is uncontested that at least some of the fuel used to make this steam, and perhaps all of it, *could have been used* to generate more electricity instead of distilling more water. The question that this case presents is whether, under these facts, FERC may *presume*, or otherwise hold without weighing Brazos' evidence, that Tenaska's use of all this steam (or indeed any of it) during those twelve months to make distilled water was for a commercial purpose independent of Tenaska's desire to qualify for PURPA benefits.

CONCLUSION

This case is worthy of review because it calls into question parties' most basic rights to have their cases decided based on evidence, not on an irrational, irrebuttable presumption. When the production of distilled water that is dumped down the sewers can give rise to hundreds of millions of dollars of benefits, and when millions of gallons of distilled water were deemed distilled for a commercial purpose despite a contractual obligation to "sell" any such water for no incremental compensation, something is wrong. As is set forth in Brazos' petition for *certiorari* and in the briefs of *amici curiae*, the cost to ratepayers nationwide of power contracts insulated from state and federal regulatory scrutiny by PURPA is enormous, and there is a pressing need to correct FERC's determination below that it will not hear challenges by purchasers of overpriced power under such contracts to the statutory propriety of those PURPA benefits. The writ should be granted.

Respectfully submitted,

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